

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1015

B
PJS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1015

UNITED STATES OF AMERICA,

Appellant,

—v.—

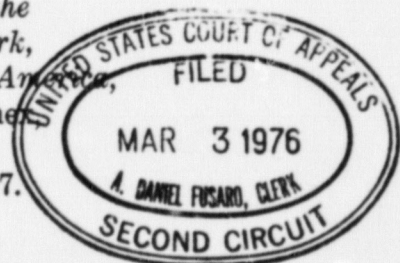
ADOLPH RIVERA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

ROBERT J. FISK, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States of America,
United States Courthouse Annex,
One St. Andrews Plaza,
New York, New York 10007.*



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| Transcript of the Suppression Hearing held on December 15, 1975 | A-48 |

JUDGE MOTLEY

74 CRIM. 675

| | | |
|-----------------------|-----|-----------------------|
| TITLE OF CASE | A 1 | ATTORNEYS |
| THE UNITED STATES | | For U. S.: |
| vs. | | James E. Nesland AUSA |
| MARC FISHER 1-4 | | 264-6470 |
| KENNETH MYERSON 1,3-4 | | |
| FREDERIC GLENN 1,3-5 | | |
| ADOLPH RIVERA 1,3-5 | | |
| | | For Defendant: |

| ABSTRACT OF COSTS | AMOUNT | CASH RECEIVED AND DISBURSED | | | |
|------------------------------|--------|-----------------------------|------|----------|-----------|
| 7 | | DATE | NAME | RECEIVED | DISBURSED |
| Fine, | | | | | |
| Clk. 5.53 47 3 2 14 | | | | | |
| Marshal, | | | | | |
| Attorney, | | | | | |
| Continued on P. 21:846 1 ct. | | | | | |
| Witnesses 21:812,841(a)(1) | | | | | |
| 841(b)(1)(B) 4 cts. | | | | | |
| Consp. to dist. LSD 1 ct. | | | | | |
| Distr. of LSD. 4 cts. | | | | | |
| 5 Counts | | | | | |

| DATE | PROCEEDINGS |
|---------|--|
| 7-8-74 | Filed Indictment. |
| 7-22-74 | Def. Fisher (No atty. pres.) Court directs entry of not guilty plea. Motions returnable in 10 days. Bail continued as fixed by Mag. (\$10,000. P.R.B.) Def. Myerson (atty. present) Pleads not guilty. Motions returnable in 10 days. Continued on bail fixed by Mag. (\$10,000. P.R.B.). Def. Glenn (atty. present) Pleads not guilty. Motions returnable in 10 days. Bail continued as fixed by Mag. (\$5,000. P.R.B. secured by 10%). Def. Rivera (atty. present) Pleads not guilty. Motions returnable in 10 days. Bail continued as fixed by Mag. (\$1,000. P.R.B.) Case assigned to Motley, J. for all purposes. Duffy, J. |

OVER

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| DATE | PROCEEDINGS | CLERK'S FEES | |
|---------|--|--------------|-----------|
| | | PLAINTIFF | DEFENDANT |
| 7-26-74 | Filed def't's Affidavit & Notice of Motion for an order suppressing certain evidence pursuant to Rule 7(d) of the FRCP. | | |
| 8-27-74 | Filed Gov't's notice of readiness. | | |
| 9-13-74 | Hearing on motion to suppress begun as to ADOLPH RIVERA & concluded..Motion Denied. Motley, J. ----- | | |
| 10-1-74 | FREDERIC GLENN - Filed affdvt. of J.E. Mesland, AUSA in response to various motions. | | |
| 1-10-75 | MARC FISHER - Motion for substitution of counsel denied....Motley, J. | | |
| 1-21-75 | MARC FISHER - Filed Affidavit & Notice of Motion for an order pursuant to Rule 7(f) directing the U.S. Atty. to file a bill of Particulars, etc. returnable before Motley, J. | | |
| 1-21-75 | MARC FISHER - Filed memorandum of law in behalf of same. | | |
| 1-28-75 | ADOLPH RIVERA - Filed memo endorsed on motion filed 7-26-74....For reasons stated on the record at the hearing held Sept. 13-74 the within motion to suppress was denied....So ordered....Motley, J.....Mailed notice... | | |
| 1-30-75 | Filed notice of motion by def't FREDERIC GLENN for any statement made by def't, for copies of laboratory report etc.....With memo endorsed...Motion denied for failure to file supporting memorandum....Motley, J.....Mailed notice... | | |
| 2-18-75 | Fill bill of particulars... | | |
| 3-5-75 | P/T conf. held...trial adj'd to 7-21-75 | | |
| 3-10-75 | Filed transcript of record of proceedings, dated Sept. 13, 1974 | | |
| 3-10-75 | Filed transcript of record of proceedings, dated JAN 27, 1975 | | |
| 3-14-75 | ADOLPH RIVERA - Filed memorandum in support of motion to suppress statements.. | | |
| 3-18-75 | Filed transcript of record of proceedings, dated 3-5-75 | | |

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See PAGE 3

| DATE | PROCEEDINGS |
|----------|---|
| 3-18-75 | MARC FISHER - Filed order of defts motion under FRCrP 16 for statements attributed to deft is denied***Motley, J. |
| 3-25-75 | ADOLPH RIVERA - Filed affdvt. & notice of motion suppressing certain evidence... |
| 5-1-75 | ADOLPH RIVERA - Filed affdvt. of James E. Nesland, AUSA in opposition to motion to suppress confession. |
| 5-1-75 | ADOLPH RIVERA - Filed Govt's memorandum of law in opposition to Rivera's motion to suppress.. |
| 5-22-75 | ADOLPH RIVERA - Filed defts memorandum in support of motion to suppress statements as product of illegal arrest. |
| 6-2-75 | Filed transcript of record of proceedings, dated 3-5-75 |
| 10-6-75 | FREDERIC GLENN - Atty. Robert Bloom present.. Withdraws plea of not guilty to cts. 1 & 3 and PLEADS GUILTY to Cts. 1 & 3.. P.S.I. ordered.. Sent. adjd to 11-21-75 3:30 bail cont'd..... Motley, J... Filed petition to enter plea of Guilty |
| 10-20-75 | KENNETH MEYERSON - Filed petition to enter plea of Guilty... Atty. & deft present, withdraws plea of not guilty and PLEADS GUILTY to count 4 only.. P.S.I. ordered sentence adjd to 11-21-75 11a.m. Bail cont'd.... Motley, J. |
| 12-1-75 | ADOLPH RIVERA - Filed Govt's memorandum of law in opposition to suppression motion. |
| 12-5-75 | MARC FISHER - Filed affdvt. of A.R. Bently, AUSA in opposition to motion for disclosure. |
| 12-5-75 | MARC FISHER - Filed Govt's memorandum in opposition to request for disclosure.. |
| 12-12-75 | A. RIVERA - Motion to suppress certain statements after arrest.. GRANTED... MOTLEY, J... |
| 12-16-75 | A. RIVERA - Filed memo endorsed on motion filed 3-25-75... Motion is granted.. Motley, J. |
| 12-19-75 | Filed transcript of record of proceedings. Dated Oct. 20, 1975 |
| 1-6-76 | F. GLENN Filed transcript of record of proceedings, dated 1-6-76, 1975 |
| 1-6-76 | ADOLPH RIVERA - Filed notice of appeal from order rendered in open court on 12-12-75..... Copy to D.J. Steinbock Fed Defender Unit 15 Park Row NYC |
| 1-9-76 | FREDERIC GLENN - Filed Judge. (Atty. Robert Bloom, present) The deft is sentenced for a period of TWO YEARS on each of cts. 1 and 3 to run concurrently with each other. Execution of sentence is suspended, deft is placed on probation for a period of TWO YEARS, subject to the standing probation order of this Court. Cts. 4 and 5 are dismissed on motion of defts counsel with the consent of the Govt..... MOTLEY, J..... Ent. 1-13-76---- |
| 1-14-76 | ADOLPH RIVERA - Filed Govt's affdvt. & notice of motion for an order severing this deft from the other defts. and staying the trial.... |
| 1-15-76 | Filed transcript of record of proceedings dated: December 12-1975. |

SEE PAGE 4-

| DATE | PROCEEDINGS |
|---------|--|
| 1-16-76 | M.FISHER - Deft.& atty.present...Withdraw plea of not guilty and PLEADS GUILTY to Ct.4 only..P.S.I. ordered sent,adjd to 2-20-76 10:30 a.m. Rm.519 Bail Cont'd. Motley,J. |
| 1-15-76 | A.RIVERA-Filed notice that orig.record certified to U.S.C.A. |
| 1-16-76 | A.RIVERA - Filed notice that the 1st Supplemental record on appeal has been certified and transmitted to the U.S.C.A. |
| 1-28-76 | A.RIVERA - Filed memo endorsed on motion filed 1-14-76....The within motion is unopposed and therefore granted....So Ordered...Motley,J...m/n |
| 2-6-76 | KENNETH MEYERSON - Filed Judgment(Atty.Jack Hoffinger,present)Deft.sentenced to THREE YEARS...Execution of sentence is suspended..Deft.is placed on probation for a period of THREE YEARS, subject to the standing probation order of this Court..Special condition of probation: Deft. is to continue psychiatric counseling. On motion of deft's counsel, counts 1 and 3 are dismissed. No opposition by the Govt.....Motley, J.....Ent.on 2-9-76----- |
| 2-25-76 | MARC FISHER - Filed Judgment(Atty.James Pascarella,present)Deft sentenced to THREE YEARS...Execution of sentence is suspended, deft is placed on probation for a period of THREE YEARS, subject to the standing probation order of this Court. Special conditions of probation. 1 Deft is to continue psychiatric treatment 2. Deft is not to engage in any type of drug transactions 3. Deft is to secure full time employment.....On motion of deft's counsel, Counts 1,2 and 3 are dismissed, no opposition by the Govt.....Motley, J.... Ent. 3-1-76----- |

REDACTED

REDACTED
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

MARC FISHER, KENNETH MYNORSON
FREDERIC GLENN and ADOLFO RIVERA,

Defendant.
-----x

REDACTED
IN CV. 675

The Grand Jury charges:

1. From on or about the 1st day of April, 1974
and continuously thereafter up to and including the date of
the filing of this indictment, in the Southern District of
New York,

MARC FISHER
KENNETH MYNORSON
FREDERIC GLENN, and
ADOLFO RIVERA

the defendant and others to the Grand Jury unknown, unlaw-
fully, intentionally and knowingly combined, conspired, confederated
and agreed together and with each other to violate Sections 812,
841(a)(1) and 841(b)(1) ^(b) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendant unlawfully, intentionally and knowingly would distribute
and possess with intent to distribute Schedule I ~~substance~~
~~substance~~ drug controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections 812,
841(a)(1) and 841(b)(1) ^(b) of Title 21, United States Code.

DPM, II:art

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

(1) On or about April 3, 1974, defendant MARC FISHER met with an undercover agent at the El Tor restaurant, 21 Greenwich Avenue, Manhattan, and agreed to sell 10,000 tabs of LSD to the agent;

(2) On or about April 3, 1974 defendant MARC FISHER met with an undercover agent at the El Tor restaurant and gave a sample of LSD to the agent;

(3) On or about April 16, 1974 defendant MARC FISHER met with defendant HENRY WINDSON at the El Tor restaurant and received 1000 tabs of LSD which defendant FISHER sold to two undercover agents; and

(4) On or about April 15, 1974 defendants FREDERIC GLINE and ADOLFO RIVERA met with two undercover agents at Manjo's Restaurant, 33 seventh Avenue, Manhattan and delivered 5000 tabs of LSD.

(Title 21, United States Code, Section 846)

A 7

USA-33s-529A - IND/INF - Distrib.-Possess Controlled Substance
Rev. 5-27-72 (Succeeding Count)

DMM, II. art

~~SECOND~~ COUNT

The Grand Jury further charges:

On or about the **8th** day of **April, 1974**
in the Southern District of New York,

MARC FISHER,

the defendant , unlawfully, intentionally and knowingly
did distribute and possess with intent to distribute a
Schedule **I** controlled substance, to wit,
**approximately 120 micrograms (4 spots) of Lysergic Acid
Diethylamide(LSD).**

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(B).)

USA-33s-529A - IND/INF - Distrib.-Possess Controlled Substance
Rev. 5-27-72 (Succeeding Count)
DEM, II:art

THEIR COUNT

The Grand Jury further charges:

On or about the **16th** day of **April, 1974**

in the Southern District of New York,

**MARC FISHER
KENNETH MYERSON
FREDERIC OLSON and
ADOLFO RIVERA**

the defendant , unlawfully, intentionally and knowingly
did distribute and possess with intent to distribute a
Schedule **I** controlled substance, to wit,
**approximately 183.03 milligrams (996 cpts) of Lysergic
Acid Diethylamide (LSD).**

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(B).) **(Title 18, United
States Code, Section 2)**

USA-33s-530A - IND/INF - Possession With Intent To Distribute
Rev. - 5-27-72 Controlled Substance (Succeeding Count)

DMS, II:art

SUCCESS COUNT

The Grand Jury further charges:

On or about the **14th** day of **April, 1974**

in the Southern District of New York,

**DAVE FLOWER
BENJAMIN ATERSON
FREDERIC (LENN) and
ADOLPH RIVARA**

the defendant~~s~~, unlawfully, intentionally and knowingly
did possess with intent to distribute a Schedule I
controlled substance, to wit, **approximately 177.9**
milligrams (1000 spots) of Lysergic Acid Diethylamide(LSD).

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(B).) **(Title 18, United
States Code, Section 2)**

USA-33s-529A - IND/INF - Distrib.-Possess Controlled Substance
Rev. 5-27-72 (Succeeding Count)

DNI, II: art

FIFTH COUNT

The Grand Jury further charges:

On or about the **16th** day of **April, 1974**
in the Southern District of New York,

**FREDERIC GLINN and
ADOLFO RIVERA**

the defendants, unlawfully, intentionally and knowingly
did distribute and possess with intent to distribute a
Schedule **I** controlled substance, to wit,
**approximately 1,083 milligrams (3936 spots) of Lysergic
Acid Diethylamide (LSD).**

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(B).) (Title 18, United
States Code, Section 2)

Foramen

WILL J. CORMAN
United States Attorney

1 rklk

Bell - Cross

28

2 building and we got upstairs.

3 Q Did you, yourself, make any attempts to obtain
4 a lawyer for Mr. Rivera?

5 A No, I did not.

6 Q Either to call his lawyer or have a lawyer assigned
7 to him before he went in to see Mr. Nessland.

8 A No.

9 MR. GREENBERG: No further questions.

10 THE COURT: We will adjourn until 4:30, gentlemen.

11 MR. BELLER: Your Honor, I have one other agent
12 and I wonder whether I couldn't put him on now.

13 THE COURT: 4:30, Mr. Beller.

14 (Pecess.)

15 MR. BELLER: The Government calls Michael
16 O'Connor.

17 M I C H A E L W. O ' C O N N O R, called as a
18 witness on behalf of the Government, having been
19 first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. BELLER:

22 Q Mr. O'Connor, how are you employed?

23 A I am employed by the Department of Justice as a
24 Sepcial Agent with the Drug Enforcement Administration here
25 in New York.

1 rklk

2 Q Were you so employed on April 61 and 17 of this
3 year?

4 A Yes, sir, I Was.

5 Q You were the agent involved in the negotiations
6 and subsequent arrest of this defendant and others with
7 respect to a violation of the narcotics laws; is that correct?

8 A Yes, sir, I was.

9 Q Did you participate in the arrest of the defendant
10 at Manjos?

11 A Yes, sir.

12 Q Approximately what time was that?

13 A Approximately 11:40 p.m.

14 Q Was the defendant taken outside the restaurant by
15 Agent Salvemini?

16 A Yes, sir, he was.

17 Q What happened there?

18 A At that time Agent Salvemini read a DEAL3A to Mr.
19 Glem and Mr. Rivera separately.

20 Q Does the DEAL3A contain advice of rights?

21 A Yes, it does.

22 Q Did Agent Salvemini inform the defendant that he
23 had a right to a lawyer?

24 A Yes, he did.

25 Q Did the defendant ask for a lawyer?

1 rklk

O'Connor - Direct

30

2 A Not at that time.

3 Q Where was he the next time you saw the defendant
4 that evening?5 A It would be the following morning, approximately
6 12:15, 12:30 at West 57th Street, our DEA headquarters here
7 in New York.8 Q Were you present or did you observe the defendant
9 being placed in a car and driven away from Manjos?

10 A No, sir.

11 Q You saw him approximately an hour later at DEA
12 headquarters?

13 A Yes.

14 Q What did you see?

15 A At that time I was just being interviewed by
16 Agent Bell and Cradera in regards to a 202, a personal
17 history.

18 Q Did he at that time ask to see a lawyer?

19 A (No response.)

20 Q Did there come a time when you took the defendant
21 from DEA headquarters to West Street?

22 A Yes.

23 Q Approximately what time was that?

24 A We left DEA headquarters approximately one o'clock
25 in the morning and we had a little trouble so to speak getting

1 rklk

O'Connor - Direct

31

2 rid of the prisoners. We went to West Street the first time.
3 They could only accept one prisoner at the time and Mr. Rivera
4 and Mr. Glenn wished they could stay together, so at that
5 time the people at West Street asked us if we could take
6 them to the Tombs. We took them to the Tombs and the
7 people there said they couldn't take them. We went back to
8 West Street and finally they were able to take them. That
9 was approximately 3:15, 3:30 in the morning.

10 Q Is it correct to say in the car during that time
11 the defendants Rivera and Glenn and you and Agent Bell were
12 in the car?

13 A Yes.

14 Q Anyone else?

15 A No.

16 Q Did you interrogate the defendant at any time in
17 the car?

18 A No.

19 Q Did he ask for a lawyer at any time in the car?

20 A No, sir.

21 Q After you dropped the defendant off at West Street,
22 when is the next time you saw him?

23 A Approximately ten o'clock that same morning when
24 we picked him up at West Street.

25 Q What did you do?

1 rklk

O'Connor - Direct

32

2 A We took him down to the Southern District,
3 explaining to him what would be happening, what would take
4 place.

5 Q Did you bring him to the office of Assistant
6 United States Attorney Nessland?

7 A Yes.

8 Q Prior to bringing him to the office of the Assistant
9 U.S. Attorney, did he ask to see a lawyer?

10 A No, sir, not at all.

11 Q Did he ask to make a phone call?

12 A Not on the way down to Southern District.

13 Q When you were in the United States Courthouse,
14 did he ask to make a phone call?

15 A Yes, he did.

16 Q Did he make a phone call?

17 A Yes, in my presence.

18 Q To whom did he ask to make a phone call?

19 A To an acquaintance of his so the acquaintance
20 would call his boss and tell him he had to go to Puerto
21 Rico.

22 Q Was he permitted to make that phone call?

23 A Yes, he did so in my presence.

24 Q Did he ask at that time or any other time to be
25 allowed to make a phone call to a lawyer?

2 A No, not at all.

3 CROSS-EXAMINATION

4 BY MR. GREENBERG:

5 Q Agent O'Connor, were you present when Mr. Rivera
6 was questioned in DEA headquarters?

7 A Only to the point for his personal history, a
8 202.

9 Q You heard the 202, the questions asked off the
10 form?

11 A Yes, sir, I was there.

12 Q Who was questioning him?

13 A Agent Bell and Agent Cradera.

14 Q Did they go into the facts of the case?

15 A No, sir.

16 Q Why not?

17 A A 202 doesn't go into the facts of the case.

18 Q Did you hear any other conversation?

19 A No, sir. During the course of the evening, I
20 was running around. I was processing the evidence.

21 Q Did you hear Agent Bell ask Mr. Rivera about some
22 of the facts of the case?

23 A No, sir, not at all.

24 Q Did you hear Mr. Rivera tell Agent Bell that he
25 didn't want to say anything until he spoke to a lawyer?

2 A No, sir.

3 Q But you were there when the questions from the
4 202 interview sheet were asked?

5 A Yes. Not the entire 202. I was there in the room
6 during some of the questioning, went to other rooms and had
7 other duties.

8 Q And you had no further contact with Mr. Rivera
9 until you took him to West Street?

10 A No, sir, not really.

11 Q Did you process Kenneth Myerson?

12 MR. BELLER: Objection.

13 I will withdraw the objection.

14 Q Who took Mr. Glenn and Mr. Rivera to West Street?

15 A Myself and Agent Bell.

16 Q They were handcuffed in the back seat?

17 A Yes.

18 Q They were together?

19 A Yes.

20 Q When you saw them in DEA headquarters, were they
21 together?

22 A No, sir.

23 Q At any time, were they together?

24 A Only when they arrived.

25 Q Did you ever see them together in DEA headquarters?

1
2 A Only when they arrived. They were all brought
3 into the place where they were fingerprinted and photographed,
4 otherwise they were separated.

5 Q When they were being fingerprinted and photographed,
6 were they together?

7 A No. You couldn't fingerprint nor photograph two
8 people at the same time.

9 Q Did you fingerprint or photograph any of these
10 people?

11 A No, sir.

12 Q Who did?

13 A I don't recall.

14 Q You drove them to the Federal House of Detention
15 the first time?

16 A Yes.

17 Q And they were together at that time?

18 A Yes, sir.

19 Q Handcuffed together?

20 A They were not handcuffed together. They were
21 each handcuffed.

22 Q And they were in the car together?

23 A In the back seat.

24 Q At any time did they make a request of you or
25 Agent Bell to make a phone call?

1 rklk

O'Connor - Cross

2 A Not when we were driving them to West Street.

3 Q Never mentioned a phone call?

4 A Never mentioned a phone call.

5 Q How about when you were driving them from West
6 Street to the Tombs?

7 A No, sir.

8 Q From the Tombs back to West Street?

9 A No, sir.

10 Q Never mentioned it?

11 A No, sir.

12 Q Did you have any conversation at all with either
13 one of these gentlemen?

14 A Yes, sir.

15 Q What were you discussing?

16 A Approximately what would happen the following day,
17 what time we would be by to pick them up, etcetera.

18 Q Did you tell them what was going to happen that
19 day?

20 A Yes.

21 Q What was that?

22 A At approximately -- this is when we picked them
23 up in the morning. I informed Mr. Glenn --

24 MR. BELLER: Could Mr. Greenberg place the time to
25 which his question relates.

1 rklk

O'Connor - Cross

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2 Are you talking about before they went to West
3 Street or the following day?

4 MR. GREENBERG: I am talking about conversations
5 in the car between West Street and the Tombs and back to West
6 Street.

7 A No, sir.

8 Q You didn't talk to them at all?

9 A No, sir.

10 Q Did you ever tell them that they should
11 cooperate?

12 A I take that back. There was a bit of discussion.
13 Mr. Rivera kept telling Mr. Glenn to tell us everything, to
14 cooperate and we kept telling him it would be to his
15 advantage if he would do so and that is where we dropped it.

16 Q Where was that?

17 A In the back seat of the car when we were on the
18 way to West Street and I would say just before we got back
19 to West Street the second time.

20 Q You picked them up, both these prisoners up at
21 around ten o'clock?

22 A Approximately ten o'clock in the morning, 10:15 that
23 same day.

24 Q Did you have any discussions with Mr. Rivera at
25 that time?

2 A No, sir. The only discussion we really had with
3 him, we told him he would be brought before a U.S. Attorney.
4 They would be interviewed again like they were last night,
5 they would be brought before a U.S. Magistrate who would set
6 bail, etcetera, etcetera.

7 Q Did you tell them they could have a lawyer?

8 A We told them if they could not afford a lawyer,
9 the court would assign one as stated in the DEAl3A.

10 Q Did you ask them whether they had a lawyer in
11 fact?

12 A No, sir.

13 Q Did you ever ask them whether they would like to
14 make a phone call?

15 A No, sir.

16 Q Did they ever ask you that morning to make a
17 phone call?

18 A Mr. Rivera did and that was to an acquaintance
19 to call his employer.

20 Q Were you there when this phone call was made?

21 A Yes.

22 Q What time was that phone call made?

23 A I don't recall, but to the best of my knowledge,
24 I would say it was around 12:30, one o'clock in the after-
25 noon.

2 Q Did you overhear the pone call?

3 A It was right next to me.

4 Q Do you know the name of the person he called?

5 A No, sir, I don't recall.

6 MR. BELLER: I object. I don't see what this is
7 relevant to at all.

8 THE COURT: Sustained.

9 Q You heard the conversation on the phone?

10 A Basically, yes.

11 Q And you testified that that conversation was
12 that tell my employer that I had to go to Puerto Rico?

13 A Yes, sir.

14 Q Did you also hear that he asked that person to
15 contact Billy Tobias and to get a lawyer?

16 A No, sir.

17 Q You are sure?

18 A No, sir.

19 Q You don't remember that?

20 A I don't recall.

21 THE COURT: Are we talking about this defendant or
22 somebody else?

23 MR. GREENBERG: This defendant, Your Honor.

24 Q You don't remember any conversation about a
25 lawyer on that phone?

1 rklk

O'Connor - Cross

40

2 MR. BELLER: The witness already said twice he
3 didn't remember.

4 THE COURT: In any event, this is after the state-
5 ment was taken by the U.S. Attorney?

6 MR. GREENBERG: This was before the statement
7 was taken, Your Honor.

8 MR. BELLER: I object to that statement.

9 Q What time was this phone call allowed for Mr.
10 Rivera?

11 A At approximately 12:30 to one o'clock as I
12 previously stated.

13 Q This was before he had gone into the U.S. Attorney's
14 office?

15 A Yes, sir.

16 Q Was Mr. Rivera handcuffed in the U.S. Attorney's
17 office?

18 A No, sir.

19 Q Had you brought Mr. Rivera to the magistrate
20 before you went to the U.S. Attorney's office?

21 A No, sir, that is not common practice.

22 Q Just answer the question.

23 A No, sir.

24 Q Did Mr. Rivera ever tell you who he was calling,
25 the name of the person?

rklk

O'Connor - Cross

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A No, sir, I don't recall.

Q If I may refresh your recollection, a Raphael Bencid, would that refresh your recollection?

A I still don't recall, sir.

Q Did you make any notes at any time that reflected that Mr. Rivera made a phone call?

A No, sir, I just remembered because he asked me explicitly.

Q And you remember specifically what he said as far as telling his boss that he went to Puerto Rico?

A He asked me if he could make a call to an acquaintance to tell his employer that he was suddenly called to Puerto Rico and wouldn't be at work.

Q Mr. Glenn was present with Mr. Rivera all this time you were with Mr. Rivera; is that correct?

A No, sir.

Q It's not correct?

A No, sir.

Q When were they apart?

A When Mr. Rivera made the phone call.

Q Prior to that, they were together?

A With all five defendants.

Q Did Mr. Glenn ever ask you to make a phone call?

A No, sir.

1 rklk

O'Connor - Cross

42

2 MR. BELLER: Objection.

3 THE COURT: Yes. Let's not ask this witness
4 about other defendants.5 Q And it's your testimony, Agent O'Connor, the only
6 time Mr. Rivera asked you for a phone call was approximately
7 twelve, 12:30 in the U.S. Attorney's office?

8 A As I stated, 12:30 to one o'clock that afternoon.

9 Q What time did Mr. Rivera go into the U.S.
10 Attorney's office?

11 A I don't recall.

12 Q Were you present in the U.S. Attorney's office?

13 A No, sir.

14 Q Would it be approximately about 1:10 in the
15 afternoon?

16 MR. BELLER: Objection. He doesn't know.

17 Q It was after the phone call; is that not correct?

18 A I don't recall, sir. I am sorry. It was before
19 he went to see the U.S. Attorney as I stated.20 Q And that was approximately 13 hours after his
21 arrest?22 A Yes, sir, approximately twelve and a half to
23 thirteen hours.24 Q Were you present at the Magistrate's court when
25 Mr. Rivera and the other defendants were arraigned?

1 rklk

O'Connor - Cross

43

2 A Yes, sir.

3 Q Was Mr. Rivera assigned counsel at that time?

4 A I don't recall.

5 Q Do you know what time Mr. Rivera went before
6 the magistrate?

7 A No, sir, I don't recall.

8 Q Would it be approximately 3:30?

9 MR. BELLER: Objection.

10 THE COURT: He says he doesn't recall.

11 Q Mr. O'Connor, did you process the defendants
12 after bail was set in the Magistrate's court?

13 A No, sir, that is not done.

14 Q You didn't take them down to be fingerprinted and
15 photographed?16 A I took them down to the U.S. Marshal's office at
17 this time. They were turned over to the custody of the
18 United States Marshals.

19 Q Did you see Mr. Rivera again that day?

20 MR. BELLER: I object. I don't see what this has
21 to do with the statement given approximately a hour before.

22 THE COURT: Yes.

23 MR. GREENBERG: I believe this is relevant. I was
24 assigned by the magistrate to represent Mr. Rivera about
25 3:40 in the afternoon and I was assigned in open court.

1 rklk

O'Connor - Cross

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2 Subsequent to my being assigned and Mr. Rivera
3 being released on bail, the agents went to Mr. Rivera's
4 apartment without prior consent of me who was Mr. Rivera's
5 attorney and I think that was an overstating of the authority
6 of these agents and I think it bears on the general way in
7 which the statements were taken and shows how the agents
8 acted and the totality of the circumstances of this arrest.

9 It's my information that Mr. O'Connor about two
10 o'clock the following morning called or knocked on the door
11 of Mr. Rivera's apartment without the consent of Mr. Rivera,
12 nor of my consent, and I was his attorney, and I think this
13 has bearing.

14 THE COURT: Was a statement taken from him at that
15 time?

16 MR. GREENBERG: No, Your Honor, but I think it
17 does have relevancy as to the credibility of this witness
18 and of the acts of the Drug Enforcement Administration
19 special agent.

20 THE COURT: You are raising a sixth amendment
21 question now, I gather, is that it?

22 MR. GREENBERG: Yes, Your Honor.

23 THE COURT: Did you raise that in your motion?

24 MR. GREENBERG: No. I just think it has some
25 bearing as to the general credibility of this agent and how

1 the statements were taken and I think it does have bearing
2 on this hearing.

3
4 THE COURT: What do you say, Mr. Beller?

5 MR. BELLER: I don't know what is coming. We
6 really don't have any objection to going ahead a little
7 further, but I frankly don't believe it will be relevant at
8 all. If you want to limit it to this witness, all right,
9 but that the DEA is on trial here, the Government would take
10 objection to that.

11 THE COURT: All right.

12 BY MR. GREENBERG:

13 Q Did you, Agent O'Connor, go back to Mr. Rivera
14 and Mr. Glenn's apartment at two o'clock in the morning, the
15 following morning?

16 THE COURT: Following their release on bail?

17 MR. GREENBERG: Yes.

18 Q Following their release on bail?

19 A I am not sure of the time, but we did go back,
20 sir.

21 Q At that time, did you have a warrant to go back
22 to that apartment?

23 A No, sir.

24 Q Did you make any attempts to contact Mr. Rivera's
25 lawyer, myself, before you went back to his apartment?

1 rklk

O'Connor - Cross

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2 A No, sir.

3 Q Did you speak to Mr. Rivera at that time?

4 A Yes, sir, we did.

5 MR. GREENBERG: No further questions.

6 MR. BELLER: The Government would move to strike
7 the last three questions and the responses. It has no
8 bearing on the issue before the Court. I don't see any
9 misconduct, any gross impropriety, any testimony that re-
10 flects on the credibility of this witness.

11 The Government didn't object to the questioning
12 though the impression I had was that it wasn't relevant, simply
13 because he made a representation that this agent's conduct
14 had something to do with his credibility. I don't see
15 anything in the questioning or the responses that makes
16 anything that Mr. Greenberg was trying to get at relevant to
17 the question of whether this statement was given volun-
18 tarily or whether defendant's right to consult with a lawyer
19 was abridged.

20 THE COURT: What happened when you went to see
21 Mr. Rivera at two o'clock in the morning?

22 THE WITNESS: Mr. Glenn was giving signs that
23 he would like to cooperate. We were trying to ascertain who
24 he received the initial package from. We were doing
25 surveillance. We were hoping Mr. Glenn would be able to tell

1 rklk

O'Connor - Cross

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2 us where this individual was and at that time we knocked on
3 the door, identified ourselves and we were voluntarily let
4 into the apartment by Mr. Glenn and Mr. Rivera.

5 MR. BELLER: We will use it for argument. We
6 don't have to have it stricken. I don't see where it's
7 terribly relevant one way or the other.

8 THE COURT: You say Mr. Glenn was giving signs
9 of wanting to cooperate, what does that mean?

10 THE WITNESS: On the way down to West Street,
11 Mr. Glenn and Mr. Rivera were having conversation as I
12 stated previously that Mr. Rivera was trying to tell Mr.
13 Glenn to cooperate and tell him everything he knew and he had
14 shown signs.

15 THE COURT: Had Mr. Rivera cooperated at that
16 point?

17 THE WITNESS: The only thing he had stated all
18 evening to my knowledge, which is hearsay, is that he didn't
19 know anything about it and he was just going along to
20 assist Mr. Glenn and he was trying to tell Mr. Glenn to
21 give us his source of supply.

22 MR. BELLER: I just have two further questions.

23 THE COURT: All right.

24 REDIRECT EXAMINATION

25 BY MR. BELLER:

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O'Connor - Redirect/Recross

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2 Q You knew at that time, didn't you, that Mr.
3 Rivera had already given a statement to AUSA Nessland?

4 A Yes.

5 Q Is it not customary to handcuff an individual after
6 he has been arrested?

7 A Yes, sir.

8 RE CROSS-EXAMINATION

9 BY MR. GREENBERG:

10 Q Was Kenneth Myerson handcuffed in your presence?

11 A Yes, sir.

12 Q Was Kenneth Myerson arrested and processed on the
13 night that Mr. Rivera was arrested?

14 MR. BELLER: Objection.

15 THE COURT: What is the relevancy of that?

16 MR. GREENBERG: Your Honor, it's my information
17 Kenneth Myerson who was arrested and who is a co-defendant
18 here was released by the agents the same night as his arrest
19 and told to return the next day. He was never handcuffed
20 and never formally arrested and spent the night at home.

21 Mr. Rivera on the other hand was arrested, hand-
22 cuffed for a period of perhaps twelve hours before he made
23 any statement and I think that has bearing, certainly upon
24 the state of mind of Mr. Rivera.

25 THE COURT: I don't follow. It has bearing on

1 rklk

O'Connor - Recross

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2 the state of mind of Mr. Rivera that somebody else was
3 let go and he was arrested?

4 MR. GREENBERG: Yes, Your Honor. It's my
5 information that Mr. Myerson was cooperating with the agents
6 and because of his cooperation, he did not have to spend
7 the night in jail and he was not handcuffed. At least Mr.
8 Rivera tells me that, he was not handcuffed and I would just
9 like to confirm that with Mr. O'Connor. He says that it's
10 standard procedure to have all prisoners handcuffed.
11 Mr. Myerson was certainly placed under arrest and it's my
12 information he was never handcuffed.

13 MR. BELLER: Objection. He never said it's the
14 practice to handcuff all prisoners. I asked him a general
15 question. There are exceptions, particularly when a
16 defendant is a cooperating defendant and has led the agents
17 to a source.

18 THE COURT: Let him answer the question so we
19 could go on.

20 A Was Mr. Myerson handcuffed when he was arrested?

21 Q Yes.

22 A Yes, sir.

23 Q Was he handcuffed when he was brought to the
24 U.S. Attorney's office?

25 A Yes, sir -- I take that back. I didn't bring
him to the U.S. Attorney's office.

1 rklk

Greenan - Direct

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2 MR. GREENBERG: No further questions.

3 MR. BELLER: Agent Greenan is here. He was
4 present at the time the defendant gave a statement to
5 Assistant United States Attorney Nessland. He can testify
6 whether rights were given. That would be hearsay. Mr.
7 Nessland is on trial. If Mr. Greenberg has no objection,
8 we will have Agent Greenan testify briefly as to the rights
9 that were given.

10 MR. GREENBERG: I have no objections.

11 THE COURT: You may come down.

12 (Witness excused.)

13 MR. BELLER: The Government calls James Greenan.

14 J A M E S G R E E N A N, called as a witness on
15 behalf of the Government, having first been duly
16 sworn, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. BELLER:

19 Q Mr. Greenan, how are you employed?

20 A I am a Special Agent with the Justice Department,
21 the DEA.

22 Q How long have you been employed?

23 A Approximately one year.

24 Q How were you employed before then?

25 A I was a Special Agent with the Treasury Department,

1 rk1k Greenan - Direct 51

2 Customs Services.

3 Q Were you with the DEA on April 16 and 17 of
4 this year?

5 A That is correct.

6 Q Were you what is known as the case agent in the
7 case involving this defendant, Adolph Rivera?

8 A That is right.

9 (Government's Exhibit 2, marked for identification.)

10 Q From the time of the defendant's arrest, were you
11 present at the arrest?

12 A That is correct, I was.

13 Q Did you see the defendant taken and put in a
14 car driven by Agents Bell and Brophy?

15 A That is correct.

16 Q Did you see the defendant subsequently at DEA
17 headquarters?

18 A That is correct.

19 Q Did you view him being processed?

20 A I fingerprinted him.

21 Q Did he ask to see a lawyer at the time you
22 fingerprinted him?

23 A I don't recall him asking anything.

24 Q You just fingerprinted him. Did you photograph
25 him as well or arrange to have him photographed?

2 A I arranged for his photographs to be taken.

3 Q Did you have any other contact with him at DEA
4 that evening?

5 A No, I didn't.

6 Q When is the next time you saw the defendant?

7 A In Assistant U.S. Attorney Nessland's office the
8 next day.

9 Q Were you present when the defendant was brought
10 into Mr. Nessland's office?

11 A Yes, I was.

12 Q Did Mr. Nessland tell the defendant who he was?

13 A Yes, he did.

14 Q Did he tell him what the purpose of the interview
15 was?

16 A That is correct.

17 Q Do you recall whether Mr. Nessland at that time
18 was filling out a form known as the U.S. Attorney's pedigree
19 form?

20 A I think it was two pages long.

21 Q I show you Government's Exhibit 2 for identification
22 and ask you if you recognize that?

23 A Yes, that is my signature on the third page.

24 Q What is that form?

25 A It's an interview form prior to arraignment by a

1 rklk Greenan - Direct

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2 United States Attorney.

3 Q Is there a date on top?

4 A Yes. The date is April 17, 1974.

5 Q Does the form indicate what time the interview
6 began?

7 A Approximately 1:10 p.m.

8 Q To your knowledge, is that the first interview by
9 Mr. Nessland with respect to this case?

10 A Yes, it is.

11 Q That was the first interview?

12 A Yes.

13 Q Were you present when Mr. Nessland interviewed
14 Kenneth Myerson?

15 A There were five defendants arraigned in the
16 morning. I believe Heather Campbell, another special agent
17 was in on one of the interviews. I believe I was in on
18 Kenneth Myerson's interview.

19 Q Was he interviewed by Mr. Nessland?

20 A Yes.

21 Q If I show this form, does it refresh your recoll-
22 ection that Mr. Myerson was interviewed at 10:45?

23 A That is correct.

24 THE COURT: What time was the defendant interviewed?

25 MR. BELLER: He was interviewed at 1:10.

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Greenan - Direct

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2

Let me have this marked as Exhibit 3.

3

(Government's Exhibit 3, marked for identification.)

4

MR. BELLER: Government's Exhibit 3 for
identification is the U.S. Attorney's interview form for
Kenneth Myerson.

7

8

Q Mr. Greenan, did Mr. Nessland tell the defendant
that he wanted to ask him a few questions?

9

A That is correct.

10

11

Q Did he tell him he had a constitutional right
to refuse to answer any questions.

12

Q Yes, he did.

13

14

15

Q Did Mr. Nessland tell the defendant that if he
chose to answer any questions, anything he said could be used
against Mr. Rivera in a court of law?

16

A That is correct.

17

18

19

Q Did Mr. Nessland ask the defendant each time he
asked those questions, whether he understood what he was being
told?

20

A That is correct.

21

Q Did the defendant state whether he understood it?

22

A He stated, Yes.

23

24

Q Did Mr. Nessland tell Mr. Rivera that he had
the right to have a lawyer present during the interview?

25

A Yes, he did.

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Greenan - Direct

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2 Q If he could not afford a lawyer, that he had a
3 right to have a lawyer appointed by the court and that the
4 interview could not proceed until the lawyer was there?

5 A Yes, he did.

6 Q Did Mr. Nessland ask Mr. Rivera whether he under-
7 stood that right?

8 A Yes, he did.

9 Q What did the defendant state in response to that
10 question?

11 A That he did.

12 Q At that point, did Mr. Nessland ask Mr. Rivera
13 whether, understanding his rights as he had been advised of
14 them, he wished to tell Mr. Nessland something about his
15 background and about his version of the facts in the case.

16 Q Yes. /

17 Q And you remember that from your memory; is that
18 correct?

19 A That is correct.

20 Q Did the defendant balk in any way at giving Mr.
21 Nessland whatever information he wanted?

22 A No, he did not. He responded in a very positive
23 manner.

24 Q What do you mean by that?

25 A He was very emphatic in what he was saying. He

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Greenan - Direct

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2 kept on telling Mr. Nessland about Fred Glenn had him do.

3 Q Did he tell Mr. Nessland that he had been trying
4 to reach a lawyer since the moment of his arrest and that he
5 had been refused that right?

6 A Not to my knowledge.

7 Q Did he say to Mr. Nessland or to you that he had
8 been harrassed?

9 A No.

10 Q Did he say he had been poorly treated?

11 A No.

12 Q Did he give a full statement to Mr. Nessland that
13 was in essence incriminating?

14 A Yes, he did. He didn't leave off that that was
15 all the narcotics business he had ever transacted, but he
16 did tell what he knew most about Fred Glenn.

17 Q When the statement was completed and Mr. Nessland
18 finished writing down what the defendant said, did Mr.
19 Nessland sign the statement?

20 A Yes, he did.

21 Q Did you sign the statement?

22 A Yes, I did.

23 Q Did the defendant sign the statement?

24 A Yes, he did.

25 Q Did he do so reluctantly?

1 rklk Greenan - Direct/Cross

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2 A No.

3 MR. BELLER: No further questions.

4 CROSS-EXAMINATION

5 BY MR. GREENBERG:

6 Q Agent Greenan, you saw Mr. Rivera at DEA head-
7 quarters?

8 A Yes.

9 Q You were the one that fingerprinted and photo-
10 graphed him?

11 A I fingerprinted him, Mr. Rivera.

12 Q As you did with all the defendants?

13 A I believe I did.

14 Q Did you see Mr. Rivera and Mr. Glenn together?
15 Were they together with you?

16 A I don't recall. Most of the time when they are
17 being fingerprinted, I don't think there is no more than one
18 other defendant in a room.

19 Q Did you spend any time at all with Mr. Rivera
20 other than fingerprinting?

21 A I believe Agent Bell took his pedigree and Agent
22 Bell was a new agent at the time. I may have helped Agent
23 Bell with the 202.

24 Q Do you remember Mr. Rivera answering questions
25 about his pedigree?

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2 A No, I don't.

3 Q Do you remember Mr. Rivera saying he didn't want
4 to answer any questions about the case until he spoke to a
5 lawyer?

6 A No, I do not.

7 Q When you fingerprinted Mr. Rivera, did you tell
8 him that he should cooperate with the DEA?

9 A I tried to introduce myself to Mr. Rivera, but he
10 didn't respond to any question or any statement or anything.

11 Q He never asked you to make a phone call?

12 A No.

13 Q Did he ever inquire when he would be allowed to make
14 a phone call?

15 A He asked me no questions.

16 Q How about Mr. Glenn, did he ever ask you whether
17 he could make a phone call in Mr. Rivera's presence?

18 MR. BELLER: Objection.

19 THE COURT: Sustained.

20 Q Did you ever tell Mr. Rivera that if he cooperated,
21 he wouldn't have to spend the night in jail?

22 A No, I did not.

23 Q Did you ever tell that to any person you arrested?

24 MR. BELLER: Objection.

25 THE COURT: What does that have to do with the

1 rklk

Greenan - Cross

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2 defendant if he told it to somebody else?

3 MR. GREENBERG: I would think it goes to his
4 credibility whether he ever made that statement to any
5 person he ever processed.

6 THE COURT: Sustained.

7 BY MR. GREENBERG:

8 Q Did you ever tell Mr. Rivera that it would be
9 easier for him if he cooperated?

10 A No, I did not.

11 Q You gave Mr. Rivera your phone number, did you
12 not?

13 A I believe I gave it to him after he made his
14 statement.

15 THE COURT: What statement are you talking about,
16 the one in the DEA office or the one in Mr. Nessland's
17 office?

18 THE WITNESS: The one in Mr. Nessland's office.

19 Q You don't remember telling Mr. Rivera if he
20 cooperated, he wouldn't have to spend another night in jail?

21 A No, I do not.

22 Q Mr. Rivera, you testified, was interviewed in Mr.
23 Nessland's office at 1:10 in the afternoon?

24 A That is correct.

25 Q Do you know what time he was presented before the

1 rklk Greenan - Cross/Rivera - Direct 60

2 Magistrate?

3 A I believe sometime around 3, 3:30.

4 Q At that time, Mr. Rivera was assigned counsel,
5 I was assigned to represent him; do you remember that?

6 A No, I do not.

7 Q You were the one that swore out the complaint in
8 the magistrate's office.

9 Q Yes, that is right.

10 MR. GREENBERG: No further questions.

11 MR. BELLER: No further questions.

12 THE COURT: Thank you.

13 (Witness excused.)

14 MR. BELLER: Government rests.

15 MR. GREENBERG: I call the defendant Adolph
16 Rivera to the stand.

17 A D O L P H R I V E R A, called as a witness,
18 having first been duly sworn, was examined and testified
19 as follows:

20 DIRECT EXAMINATION

21 BY MR. GREENBERG:

22 Q What is your full name?

23 A Adolph Rivera.

24 Q What do your friends call you?

25 A Ritchie.

2 THE COURT: Thank you, you may come down.

3 (Witness excused.)

4 MR. GREENBERG: Defense rests.

5 THE COURT: Anything further from the Government?

6 MR. BELLER: No, Your Honor.

7 THE COURT: It seems to me, Mr. Greenberg, what
8 occurred here, is that the defendant was given his rights
9 by Mr. Nessland before he made the statement, isn't that so?

10 MR. GREENBERG: Yes, Your Honor.

11 THE COURT: He just made a telephone call, accord-
12 ing to his own statement, isn't that so?

13 MR. GREENBERG: That is correct, Your Honor.

14 THE COURT: And he understood his right to remain
15 silent, did he?

16 MR. GREENBERG: He did.

17 THE COURT: That he had a right to have a lawyer
18 present or could try to get one, isn't that so?

19 MR. GREENBERG: Yes.

20 THE COURT: I don't understand what your claim is.

21 MR. GREENBERG: My claim is, Your Honor, that
22 under the totality of the circumstances, notwithstanding, as
23 Your Honor has pointed out that he was given permission to
24 make a phone call around 12:10 in the afternoon and notwith-
25 standing the fact that when he made the statement to Mr.

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2 Nessland he had been advised of his rights; that by then,
3 he had been effectively denied of his right to counsel many
4 times previous when he was originally arrested and taken --

5 THE COURT: The evidence shows, doesn't it, he
6 was not only advised by the agents that he shouldn't say
7 anything until he saw a lawyer, but also by Mr. Glenn;
8 wasn't that Mr. Glenn's testimony?

9 MR. GREENBERG: That is correct, Your Honor.

10 As a matter of fact, when he spoke with Agent Bell,
11 the first agent to really interrogate him, he told Agent Bell,
12 without speaking to Mr. Glenn or anyone else, according to
13 Mr. Bell's testimony, that he didn't think he should speak
14 with anyone until he spoke with a lawyer or had some legal
15 advice.

16 THE COURT: That is the issue, isn't it, whether
17 the defendant was advised and understood his right, isn't
18 that what this is all about?

19 MR. GREENBERG: That is correct, but we maintain
20 he made repeated attempts to get someone to advise him of
21 what he should do, a lawyer. That he requested repeatedly
22 from various authorities whether agents or correction
23 authority people to talk to a lawyer and he was denied that
24 request at each and every stage of the proceeding.

25 THE COURT: But he made no statement at that point.

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2 He didn't make any incriminating statement until he saw
3 Mr. Nessland after having been advised of his rights and
4 after having called someone to get a lawyer; isn't that so?

5 MR. GREENBERG: That is correct.

6 THE COURT: He didn't testify that he told Mr.
7 Nessland, "My lawyer is on the way and I would like to
8 wait until he gets here"; did he?

9 MR. GREENBERG: No.

10 THE COURT: The motion is denied.

11 We have to set a date for trial.

12 MR. GREENBERG: May I just add one thing further,
13 Your Honor.

14 It seems to me that Mr. Rivera upon arrest at
15 11:30 or so on one night and not being presented before the
16 magistrate --

17 THE COURT: You didn't make that motion, I will
18 not hear it. You made a motion to suppress a statement that
19 was just denied. I will not hear a motion that you didn't
20 make.

21 MR. GREENBERG: I believe within my motion papers
22 I do allege that he was arrested in the early morning hours
23 and in my motion papers on page 2, it says he was taken
24 before Magistrate Goettel at 3:40 p.m. and I believe it's
25 part of my motion papers and I maintain that is an unduly

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2 long period of time before he is arraigneded.

3 THE COURT: You submit a brief on that.

4 MR. GREENBERG: I will, Your Honor.

5 THE COURT: The trial will be Wednesday, December 4
6 at ten o'clock, room 618.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA, :
v. :
ADOLPH RIVERA, : 74 Criminal 675
Defendant. :
----- x

Before:

HON. CONSTANCE B. MOTLEY,
District Judge
New York, December 15, 1975
Room 1515 - 10 a.m.

APPEARANCES

THOMAS J. CAHILL, Esq.,
United States Attorney for the
Southern District of New York,
By: ALLEN BENTLEY, Esq.,
Assistant United States Attorney.

DANIEL STEINGACH, Esq.,
Attorney for Defendant

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(Case called.)

MR. BENTLEY: The government is ready.

MR. STEINHACH: The defendant is ready.

THE COURT: Mr. Steinbach, did you have some witnesses you wanted to put on?

MR. STEINBACH: No. I believe Mr. Bentley may have, though.

THE COURT: All right.

MR. BENTLEY: The government would call Michael O'Connor.

M I C H A E L W. O ' C O N N O R, called as a witness on behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENTLEY:

Q Mr. O'Connor, please keep your voice up so that the people seated toward the rear of the courtroom can hear you.

Mr. O'Connor, by whom are you employed?

A The Department of Justice, Drug Enforcement Administration.

Q What position do you hold with the Drug Enforcement Administration?

A Special Agent.

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O'Connor-direct

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2 Q Directing your attention to April 16, 1974,
3 at approximately 11:20 p.m., were you on duty at that time?

4 A Yes, I was.

5 Q What, if anything, did you do?

6 A Myself and a defendant who agreed to cooperate
7 with the government by the name of Kenneth Meyerson arrived
8 at Manjo's Restaurant located at 33 7th Avenue,
9 New York City.

10 Q When had you met Meyerson?

11 A Earlier that evening.

12 Q Under what circumstances had you met Meyerson?

13 A Mr. Meyerson conspired to deliver 5,000 dots
14 of LSD to me.

15 THE COURT: Mr. Meyerson did what?

16 THE WITNESS: Conspired to deliver 5,000
17 dosage units of LSD.

18 THE COURT: You mean agreed?

19 THE WITNESS: Yes.

20 Q What had happened with respect to Mr. Meyerson
21 when you originally made contact with him?

22 A Mr. Meyerson was placed under arrest and was
23 taken to New York Regional Headquarters, where at that time
24 he agreed to cooperate with the government.

25 Q What form did his cooperation take?

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2 A He placed a telephone call to a Mr. Frederick
3 Glenn and arrangements were made for Mr. Glenn to deliver
4 5,000 dosage units of LSD to myself at that previously
5 mentioned restaurant.

6 Q Based on your investigation, please tell us
7 what role Meyerson was playing in these LSD transactions
8 with relation to the other defendants in this case.

9 MR. STEINBACH: Objection, your Honor, unless
10 what he is about to answer relates to his information at that
11 time, that is, if he now knows of a role that Meyerson was
12 playing which he didn't know at the time, it would be
13 irrelevant to his probable cause at the time he made the
14 arrest of Mr. Rivera.

15 THE COURT: Let me hear the question, Mr. Reporter.
16 (Question read.)

17 THE COURT: You are asking him what role
18 Kenneth Meyerson was playing with respect to the instant
19 indictment?

20 MR. BENTLEY: Yes, your Honor.

21 THE COURT: All right. Overruled.

22 Q You may answer, sir.

23 A Mr. Meyerson was receiving the LSD from
24 Mr. Glenn, in turn he would give it to Mark Fisher, who in
25 turn gave it to me.

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O'Connor-direct

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1 THE COURT: I thought you meant he was acting
2 as an informer for the government in this case. Is that
3 it?
4

5 MR. BENTLEY: No, your Honor. I am trying
6 to place Mr. Meyerson with respect to the other defendants
7 in the indictment so the Court can see how the investi-
8 gation developed following Meyerson's arrest.

9 THE COURT: As I understood the witness,
10 he testified that he met Kenneth Meyerson at Manjo's
11 Restaurant, where Meyerson delivered a quantity of LSD.
12 He was arrested and agreed to cooperate with the government.

13 Is that your testimony?

14 THE WITNESS: No, ma'am.

15 THE COURT: I misunderstood them.

16 MR. BENTLEY: It may be confusing in the way
17 I approached the subject, your Honor.

18 Q At what location was Mr. Meyerson arrested?

19 A At the El Tor Restaurant located in Greenwich
20 Village.

21 Q At what hour, approximately?

22 A At approximately 7 o'clock that evening.

23 Q Who was with him at that time?

24 A Mark Fisher.

25 Q Who were you dealing with directly at that time?

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O'Connor-direct

2 A Mark Fisher.

3 THE COURT: Was that his prior testimony?

4 MR. BENTLEY: Yes, your Honor, I believe that
5 is his prior testimony.

6 THE COURT: This just now?

7 MR. BENTLEY: Yes, your Honor.

8 Q Following the arrest of Fisher and Meyerson
9 what happened?

10 A After being taken back to the New York
11 Regional Headquarters, where they were processed and every-
12 thing else, Mr. Meyerson agreed to cooperate with the govern-
13 ment and he gave up the source of supply for the 5,000 units,
14 dosage units of LSD.

15 At this time Mr. Meyerson placed a telephone
16 call to Mr. Frederick Glenn and made arrangements for
17 Mr. Glenn to deliver the additional 5,000 dosage units of
18 LSD to myself and Mr. Meyerson at Manjo's Restaurant.

19 THE COURT: Were you asked the question to which
20 Mr. Steinbach objected, as to what role Meyerson was play-
21 ing, I thought you expected the witness to say at that
22 point he was acting as an informer or working with the
23 government, but instead of that he told us that
24 certain people delivered --

25 MR. BENTLEY: I am sorry. That would have

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O'Connor-direct

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2 been a proper answer. However, I am interested in develop-
3 ing through this witness the relationship and the flow
4 of the LSD and the nature of the investigation which proceeded
5 back toward the source of the LSD.

6 MR. STEINBACH: Your Honor, I would object to
7 that kind of inquiry. I think the only thing that is
8 relevant is what Mr. O'Connor or the other agents knew
9 at the time that they placed Mr. Rivera under arrest in terms
10 of determining probable cause for that arrest.

11 THE COURT: Are you leading up to that?

12 MR. BENTLEY: Yes, I am.

13 THE COURT: Probable cause for the arrest of
14 this defendant.

15 MR. BENTLEY: Absolutely.

16 THE COURT: All right.

17 Q Agent O'Connor, what happened when you ar-
18 rived at Manjo's Restaurant?

19 A Kenneth Meyerson and myself, we entered the
20 restaurant, proceeded to about the middle of the restaur-
21 ant, and we seated ourselves at a booth. I was seated
22 with my back to the door and Kenneth Meyerson was facing
23 the door.

24 Q Which side of the restaurant was the booth on?

25 A On the left-hand side.

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2 Q As you entered the restaurant?

3 A As -- yes.

4 Q And what did you do after seating yourselves
5 in the booth?

6 A At the time after seating ourselves in the booth
7 we ordered some food.

8 Q What happened thereafter?

9 A Approximately 11:30 p.m. Mr. Meyerson stated
10 that his people were here, and at this time I turned and he
11 pointed out Mr. Glenn and Mr. Rivera.

12 Q Do you see Mr. Rivera here in court?

13 A Yes, I do. Mr. Rivera is seated at the
14 defense table next to counsel.

15 MR. STEINBACH: Conceded that he has identified
16 Mr. Rivera.

17 Q What happened when Rivera and Glenn entered the
18 restaurant?

19 A They proceeded to your booth and they joined
20 us, with Mr. Rivera sitting to my right and Mr. Glenn
21 sitting to Mr. Meyerson's left.

22 Q Would it be fair to say Mr. Rivera was sitting
23 on the aisle?

24 A Yes, Mr. Glenn and Mr. Rivera were sitting on the
25 aisle.

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O'Connor-direct

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2 Q They were sitting across from each other?

3 A Yes.

4 THE COURT: This was Manjo's, is that it?

5 THE WITNESS: Yes, ma'am.

6 THE COURT: When was that?

7 THE WITNESS: Approximately 11:30 p.m..

8 THE COURT: What date?

9 THE WITNESS: April 16th.

10 Q Did you notice anything abnormal about Rivera's
11 appearance?

12 A No.

13 Q What happened after Rivera and Glenn sat down
14 at your table?15 A Mr. Meyerson introduced myself to the two of them
16 as the individual who was interested in purchasing the
17 additional stuff that Mr. Meyerson used. At this time
18 Mr. Glenn turned to Mr. Meyerson and asked where the money
19 was.

20 Q What money was that, sir?

21 A That was the money for the first 5,000 that
22 was reportedly sold earlier that evening to myself.

23 Q What did you say in response to that question?

24 A At that time I informed Mr. Glenn that I had the
25 money and that I was going to keep it until the additional

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O'Connor-direct

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2 5,000 went.

3 Q What, if anything, did Mr. Glenn say at that
4 time?

5 A Mr. Glenn then stated he preferred not to do it
6 in the restaurant because it was public, he wanted to do
7 it in his apartment, at which I told him I would do it here
8 or no place at all.

9 Q Then what happened?

10 A Then Mr. Glenn and myself, we talked about how
11 the transaction would go, and I said I would count out
12 \$1800 in the presence of his friend, Mr. Rivera, he would
13 watch me count the money, agree that it was all there, and
14 then I would pass it under the table to Mr. Glenn, who in
15 turn would hand me the LSD, the 5,000 dots. Upon examining
16 it I would then pay him for the second 5,000 LSD which again
17 with Mr. Rivera watching me count out the money. And they
18 all agreed to it.

19 Q How much money were you paying for the first
20 installment?

21 A \$1800.

22 Q Did Mr. Rivera by words or action indicate that
23 he understood and agreed to this proposal?

24 MR. STEINBACH: Objection. It is a leading
25 question. I think he should ask him just what Mr. Rivera

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O'Connor-direct

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2 did.

3 THE COURT: Yes. What was said, what did he do?

4 A At the time when I asked all the participants
5 if they agreed to it I turned to Mr. Rivera and he nodded
6 his head in agreement.

7 Q Did you then proceed to conduct this transaction
8 along the lines that you had proposed?

9 A Yes, I did.

10 Q Tell the Court what you did.

11 A I took out the OAF, the official advance funds,
12 which I had and I counted out \$1800, and during the time
13 I was counting out \$1800 I would watch -- I would look at
14 Mr. Rivera to be sure he was counting and he was watching
15 me count the money.

16 Q How did you count it, physically where did you
17 hold it as you were counting it?

18 A I held it down to my right side. It was
19 in between myself and Mr. Rivera.

20 Q Was that above or beneath the level of the table
21 top?

22 A Beneath the table top.

23 Q What, if anything, did Rivera do after you
24 completed counting out the money?

25 A At that time he just turned his head and

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2 and watched Mr. Glenn while I passed the OAF to Mr. Glenn.

3 Q What do you mean by OAF?

4 A Official advance funds.

5 Q What happened after you passed this money to
6 Mr. Glenn?

7 A Mr. Glenn at this time handed me a white envel-
8 ope con-aining 5,000 dosage units of LSD. Upon examining
9 the package --

10 Q Just a moment, sir. How did you pass the money
11 to Mr. Glenn?

12 A Underneath the table.

13 Q And how did Mr. Glenn pass you the LSD?

14 A Underneath the table.

15 Q And when you received the LSD what did you do?

16 A I examined it to be sure it did contain LSD
17 and upon examining it and determining that it did I gave
18 the prearranged arresting signal.

19 Q What was that signal?

20 A I scratched my head.

21 Q Following your giving of that signal what
22 happened?

23 A Mr. Glenn and Mr. Rivera were placed under
24 arrest.

25 MR. BENTLEY: No further questions.

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2 CROSS EXAMINATION

3 BY MR. STEINBACH:

4 Q Mr. O'Connor, did you make reports, DEA6 reports,
5 of this incident?

6 A Yes.

7 Q Do you have them with you here in court?

8 A I do not.

9 MR. STEINBACH: I would inquire at this time
10 whether Mr. Bentley has them.

11 MR. BENTLEY: I do have them.

12 MR. STEINBACH: Your Honor, I would request to
13 see Mr. O'Connor's report of the events which he just
14 testified to of April 16, 1974.

15 MR. BENTLEY: If the Court asks me to, I will
16 be happy to furnish it to counsel. On reviewing Section
17 3500, it specifically refers to trial testimony rather than
18 suppression hearing testimony. But should the Court feel
19 it is appropriate, I would be happy to give the report to
20 counsel.

21 THE COURT: The statute does say after a witness
22 has testified for the government, you can construe that to
23 mean only when he has testified at a trial?

24 MR. BENTLEY: I believe it mentions trial
25 specifically, your Honor.

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O'Connor-cross

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2 THE COURT: Let's see. 35(b) reads "After a
3 witness called by the United States has testified on direct
4 examination."

5 MR. BENTLEY: I was referring, your Honor, to
6 35(a), which states that no statement or report shall be a
7 subject of discovery until such witness has testified on
8 direct examination in the trial of the case.

9 THE COURT: I see. I believe, Mr. Steinbach,
10 the Second Circuit has ruled on that and that it is
11 limited to trial.

12 MR. STEINBACH: Very well, your Honor.
13 I think it is highly relevant, however, since this incident
14 occurred over 1-1/2 years ago, and while Mr. O'Connor has
15 testified I guess to what his recollection of that is,
16 I think in testing his credibility it is important to have
17 that report. However, I will go on.

18 THE COURT: All right.

19 Q Did you read the report to refresh your recol-
20 lection, the DEA6, to refresh your recollection before you
21 testified here today?

22 A Yes, I did.

23 MR. STEINBACH: I now have another basis
24 for requesting the statement, your Honor, that is,
25 to see a statement that the witness used to refresh his

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O'Cobnor-cross

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2 recollection, which I believe under the rules of evidence
3 you can see at any time. Once a witness has refreshed
4 his recollection with a statement in the course of his
5 testimony or beforehand I would be able to see that.

6 MR. BENTLEY: I would agree if he refreshed his
7 recollection on the witness stand. However, I don't
8 believe it covers a pre-testimony use of such material, and
9 I think as to that Section 3500 supersedes any other rules
10 that might apply.

11 MR. STEINBACH: Your Honor, it can't really turn
12 on whether he looked at it outside the door of the courtroom
13 or whether he looked at the on the stand.

14 THE COURT: I do think that perhaps the rules
15 provide for statutory exception.

16 MR. STEINBACH: Your Honor, I would refer you to
17 Rule 612 of the Federal Rules of Evidence.

18 THE COURT: Just a moment. 612, and I refer you
19 for the reason that it does not support my position, it sup-
20 ports Mr. Bentley, since it provides an exception to
21 seeing a writing used to refresh memory for writings which
22 would come under Section 3500.

23 THE COURT: All right.

24 Q You got to the restaurant about what time that
25 evening, Mr. O'Connor?

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2 A 11:20 p.m.

3 Q Did you go directly to that table that you
4 described?

5 A Yes.

6 Q Would you describe the lighting in the restaur-
7 ant at that time?

8 A It was very well lit.

9 Q Do you remember what kind of lights were
10 over the table?

11 A I don't recall if there were any lights directly
12 over the table.

13 Q When Mr. Rivera and Mr. Glenn arrived you say that
14 Mr. Meyerson said something to you; is that correct?

15 A Yes.

16 Q And would you tell us what he said?

17 A I believe he stated that they are here.

18 Q They are here?

19 A Yes.

20 Q And then they sat down, is that right?

21 A They walked over to the table and
22 joined us in the booth.

23 Q Were they introduced before they sat down or
24 after they sat down?

25 A After.

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O'Connor-cross

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Q And did Mr. Meyerson say something to the effect "This is Fred and this is Richie"?

A Yes.

Q "This is Mike," meaning you?

A Yes.

Q Was that the name you were using at the time?

A Yes.

Q And at that time Mr. Glenn turned to Mr. Meyerson and asked him where the money was for the earlier sale, is that correct?

A Yes.

Q And you and Fred Glenn had a discussion about how the deal between you and him was going to happen, right?

A Yes.

Q And the way it was going to happen was that he was going to pass the LSD under the table to you and you were going to pass the money under the table to him?

A No, that I would pass the money first and then he would pass the LSD.

Q Okay.

What were you holding the money in, what did you have the money in?

A My pocket.

Q Was it in a wallet?

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O'Connor-cross

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A My pocket.

Q Just rolled up or --

A Yes.

Q With a rubberband around it?

A No.

Q Loose?

A Yes.

Q What kind of bills did you have?

A American currency.

Q What denomination?

A I don't recall.

Q Could it have been hundred dollar bills?

A Yes.

Q What was the smallest denomination you had?

A \$50.

Q Do you remember whether you had many hundreds
or many fifties?

A I don't recall.

Q You said that there was a signal which you
would give and the other officers would move in to arrest,
is that correct?

A Yes.

Q And that was scratching your head?

A Yes.

1 lhbr
2 Q Had you discussed this signal with your
3 fellow officers before you sat down at the table with
4 Kenny Meyerson?

5 A Yes.

6 Q In the course of your discussions with them
7 was it agreed that they would arrest anybody who came in
8 and sat down at the table with you once you gave the signal?

9 A Yes.

10 MR. STEINBACK: I have no further questions.

11 THE COURT: Any redirect?

12 MR. BENTLEY: No redirect, your Honor.

13 THE COURT: You may come down.

14 (Witness excused.)

15 THE COURT: At this time we will take a brief
16 recess in this case.

17 (Recess.)

18 THE COURT: All right. Does the government
19 have another witness?

20 MR. BENTLEY: Yes. The government calls
21 Joseph Salvamini.
22
23
24
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1 jhbr Salvamini-direct 20

2 J O S E P H S A L V A M I N I, called as a witness
3 by the government, having been first duly sworn,
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. BENTLEY:

7 Q By whom are you employed, sir?

8 A I am employed by the United States Department
9 of Justice as a group supervisor for the New York Drug
10 Enforcement Task Force.

11 Q Directing your attention to April 16, 1974,
12 at approximately 11:20 p.m., were you on duty at that time?

13 A Yes, sir, I was.

14 Q Where were you on duty?

15 A I was at a restaurant called Manjo's.

16 I think the address is 33 7th Avenue, Manhattan.

17 Q What were you doing there?

18 A I was acting group supervisor of Group 32 at
19 the region and I was surveilling an undercover operation.

20 Q Please keep your voice up so you can be heard
21 back at the counsel table.

22 A I am sorry.

23 Q Where were you inside of Manjo's Restaurant?

24 A I was at a counter in the restaurant.

25 Q Were you seated or standing?

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2 A I was seated at the counter.

3 Q What did you observe?

4 A I observed Special Agent O'Connor and an
5 informant enter the premises and take a seat at a table.
6 The table was to my right.

7 Q What was the informer?

8 A It was one of the defendants we had arrested
9 previously in the case, earlier that evening. I believe
10 his name was Meyerson.

11 Q What happened after you saw them take their
12 seats at the table?

13 A A short while later two other individuals
14 entered the premises.

15 Q Subsequently did you learn their names?

16 A Yes, sir. One individual's name was
17 Adolph Rivera and I believe the other individual's name
18 is Fred Glenn.

19 Q Do you see Mr. Rivera here in court?

20 A Yes, sir, I do.

21 Q Would you please point him out for the Court?

22 A Yes, sir. He is the black gentleman seated
23 at counsel table with the black suit.

24 MR. STEINBACH: Concede that he identified
25 Mr. Rivera.

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Salvamini-direct

22

2 Q What did you observe them do at this table?

3 A Mr. Rivera sat next to Special Agent O'Connor.
4 This would be with their backs to the street. The other
5 defendant, Mr. Glenn, sat on the other side of the table.

6 Q What happened?

7 A There was some conversation among the parties,
8 which I didn't overhear. I could see nodding of heads and
9 gesturing back and forth. And then Special Agent O'Connor
10 took a quantity of government funds and he began to count it.
11 He turned his body thusly, towards me, which would be also
12 towards the defendant Rivera, and he began to count it, and
13 at that time the defendant Rivera leaned forward and was
14 looking right at Special Agent O'Connor's hands as he
15 counted the government funds.

16 Q How was Rivera oriented toward you as he was
17 looking at the funds?

18 A He was turned towards Special Agent O'Connor.

19 Q In other words, his back was toward you, more
20 or less?

21 A Well, I wouldn't say his back was towards me,
22 because they were a little bit forward of me. So I would
23 say the side of his body was turned towards me.

24 Q Could you see the money?

25 A Yes, sir, I could.

1
2 Q What happened after that?

3 A He was nodding his head a couple of times and
4 subsequent to that Special Agent O'Connor handed the money
5 across under the table.

6 Q Whom did he hand that money to?

7 A I believe he handed it to Defendant Glenn.

8 Q And then what happened?

9 A Special Agent O'Connor gave a prearranged
10 signal, which was to run his fingers through his hair, and
11 I walked over to the table, I took out my badge, and I
12 advised Meyerson, Mr. Rivera and Mr. Glenn that they were
13 under arrest for violation of the federal narcotics laws.

14 Q Prior to the arrest did you see Mr. Glenn do
15 anything? After he had accepted the money under the table.

16 A Yes. He put the money in his pocket. I believe
17 it was his back pocket.

18 Q Did you see him do anything else?

19 A Not that I can recall.

20 MR. BENTLEY: No further questions.

21 CROSS EXAMINATION

22 BY MR. STEINBACH:

23 Q Mr. Salvamiri, I assume you made a DEA6 about
24 the surveillance?

25 A My 6 is incorporated with the standard 6 that was

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2 written for all of us. WE don't all write 6s.

3 Q Who wrote the one relating to this arrest?

4 A I believe Special Agent Keckler wrote it.

5 Q Did you sign it?

6 A No. My name is on it though.

7 Q He mentions you?

8 A Yes.

9 Q So you didn't make any notes of your own about
10 this?

11 A No, sir.

12 Q Were you seated at a counter?

13 A Yes, sir.

14 Q On a stool?

15 A Yes.

16 Q Did the stool spin around?

17 A I don't recall.

18 Q How far was the counter from the table where
19 these gentlemen were seated?20 A I would estimate approximately the distance
21 from where I am sitting right now to the door over there,
22 at the most.

23 Q The door of the courtroom?

24 A Yes.

25 Q Would you say that it is about 40 feet?

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Salvamini-cross

25

2 MR. BENTLEY: It looks more like about 25 to me.

3 MR. STEINBACH: Somewhere between 25 to 40.

4 Your Honor, with your permission, I will approach
5 the witness. I would like him to sketch out the relation-
6 ship of the counter to the table.

7 THE COURT: All right.

8 A The table would have been over here. It was like
9 sort of a booth type situation.

10 Q Why don't you just draw it without saying
11 anything, so there won't be a record, and then I will ask
12 you to describe it on the record.

13 A All right. I would be seated sort of like over
14 here.

15 Q Would you show the counter?

16 Let's start over, if you don't mind.

17 A This would be the counter. It was an oval
18 type thing, if I recall.

19 Q Just draw the counter and draw the table.
20 Don't draw any arrows, please.

21 A Okay. I believe the counter was like this,
22 I was on a corner stool, and the table was sort of like
23 this.

24 Q Where were the seats? Show where the seats
25 were.

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2 A The seat would be here and here. In other
3 words, I was looking this way.

4 Q I asked you not to draw any arrows.

5 A I am sorry. I was almost --

6 Q Would you indicate whether there were any
7 tables between --

8 A No. This was all an open area.

9 Q This was the counter?

10 A Yes. I would have been almost -- this isn't
11 quite right -- I would have been almost parallel to the
12 midline of the table.

13 Q Would you label counter on the diagram and table
14 on the table and would you pt an AR where you saw
15 Mr. Rivera and an MO where you saw Mr. O'Connor and
16 an FG where you saw Frederick Glenn and a KM where you saw
17 Kenneth Meyerson.

18 A I am afraid art isn't one of my fortes.

19 Q How high was the table from the floor?

20 A The table?

21 Q From the floor. Would you say it is as high
22 as counsel table here in the courtroom?

23 A Yes, I would say.

24 Q How high was the booths, the back of the
25 booths that they were sitting in?

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Salvamini-cross

27

1 A I would say up to the level of the individual's
2 neck or so.

3 Q Up to the level of the neck.

4 And do you remember what Mr. Rivera was
5 wearing that evening?

6 A Offhand, I don't. I know it was committed to the
7 reports.

8 Q Do you know whether you were wearing a coat that
9 evening?

10 A I honestly don't.

11 Q This was in April '74?

12 A Yes. I honestly don't remember what I was wear-
13 ing.

14 Q And where would you say Mr. O'Connor's hands were
15 when he was counting the money?

16 A Between himself and Mr. Rivera.

17 Q And were they above the table height or below it?

18 A No, no, they were below the table.

19 Q Below the table?

20 A From the position I was in I was able to look
21 right at him.

22 Q You were facing the table the whole time this
23 was going on?

24 A In other words, I was facing the way I am now
25

1 jhbr

2 and the table was to my right. The center line of the
3 table would be almost perpendicular to the point I was sit-
4 ting at.

5 Q In other words, you were looking off to your
6 right to see them, is that correct?

7 A Yes.

8 Q Did you have your eyes on them the whole time?

9 A Yes.

10 Q Do you remember whether there was any food on
11 the table while they were there?

12 A I believe there was, yes.

13 Q Do you remember whether there were plates and
14 glasses?

15 A I know there was food on the table because we
16 were all hungry, we hadn't eaten all day.

17 Q Mr. Salvamini, you had agreed with Mr. O'Connor,
18 had you not, that at the time he ran his fingers through
19 his hair you would arrest everybody at the table other than
20 him, is that correct?

21 A No, sir. I told him, you know, depending on
22 what happened, I would place the defendants under arrest.

23 Q Defendants meaning anybody who arrived to sit
24 down at the table?

25 A Defendants meaning anybody that I perceived

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2 to have been a participant in a narcotics transaction.

3 Q When you saw Mr. O'Connor run his fingers
4 through his hair who did you go up and apprehend?5 A What I did was I walked right up to the table and
6 I stated to the three individuals at the table that were
7 not federal narcotics officers that I was a federal narcotics
8 agent and they were under arrest.9 Q At that time were there any other officers who
10 approached the table with you?

11 A Yes, there were.

12 Q Who were they?

13 A I believe Special Agent Greenan and Special
14 Agent Keckler was the other.15 A Did they approach the table the same time you
16 did?17 A I wasn't watching them. I was watching the
18 defendants. They got there pretty much simultaneously.19 Q Did you ever place your hands on any of the
20 defendants to take them out of the booth?21 A I don't think so. It was a pretty quiet sort of
22 situation.

23 Q Did you handcuff any of the defendants?

24 A I think I did, but I am not certain.

25 MR. BENTLEY: Objection to this type of

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Salvamini-cross

30

questioning, going to irrelevant matters.

Q Did you handcuff Mr. Rivera?

A I don't recall.

MR. BENTLEY: Objection.

Q When you saw Mr. O'Connor counting the money could you tell what denominations he had in his hand?

A I knew what he had because it was official agency funds.

Q What did he have, what denominations?

A I don't recall right now, but at the time I knew exactly what it was.

Q Would it be in your report?

A It should be in one of the reports in the file, yes, sir. As a matter of fact, the money is still retained as evidence.

Q When he was counting it was folded over or was --

A No, sir. As I recall, it was straight out.

Q When he would count off a bill would he remove it from the pile or would he just move past it in the pile?

A No, he was actually physically going one, two, three.

Q And he was removing the bills from the pile and

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Salvamini-cross

31

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2 pacling them where?

3 A In a second pile.

4 Q Where was that second pile?

5 A In his right hand.

6 Q On the table?

7 A In his right hand. In other words, he was
8 removing the bills one by one from his left hand and going to
9 his right hand, one, two, three.

10 Q What hand was he removing them with?

11 A With his right hand.

12 Q And he was keeping that second pile in his right
13 hand as he was doing it?

14 A Yes.

15 Q He was moving them from one hand to another is
16 what you are saying?

17 A Yes.

18 Q Is that correct?

19 A Yes. But a very distinct motion. In other
20 words, his hands were not close together. His hands were,
21 I would say, a good six, eight inches apart. It was a
22 very distinct maneuver.

23 Q How far apart were he and Mr. Rivera?

24 A They were very close together.

25 Q What was Mr. Glenn doing while he was counting

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Salvamini-cross

2 the money, Mr. O'Connor was counting the money?

3 A He was watching Mr. Rivera.

4 Q Was watching who?

5 A Mr. Rivera.

6 Q You mean his head was faced towards Mr. Rivera,
7 is that correct?

8 A That's what you asked.

9 Q You couldn't see his eyes then, could you,
10 Mr. Glenn's eyes?

11 A Absolutely not.

12 Q While Mr. O'Connor was counting the money was
13 he looking down towards his hands?

14 A Yes, sir.

15 MR. STEINBACH: I have no further questions.

16 Your Honor, at this point I would like this to
17 be marked for identification as Defendants' Exhibit A.18 (Defendants' Exhibit A was marked for
19 identification.)

20 MR. STEINBACH: I would show it to Agent Salvamini.

21 Q Is that the diagram you just drew in response
22 to my questions?

23 A Right.

24 MR. STEINBACH: I would offer it into evidence
25 at this time.

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Salvamini-cross

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MR. BENTLEY: No objection.

THE COURT: Let is be received.

(Defendants' Exhibit A was received in evidence.)

BY MR. STEINBACH:

Q Do you remember how many legs the table had?

A I don't believe it had any legs at all.

I believe it was a center pedestal type thing.

Q So there was one leg in the middle?

A In the center, as I recall, yes. It was partially attached to the wall, as my memory serves me. In other words, the table ran up to the wall.

Q And there was one center pedestal in the middle?

A I believe so.

Q You didn't examine the booth before anybody got there?

A It was a standard luncheonette type --

Q Were there any tables between where you were seated and where --

A I had a clear shot right directly into the center.

Q I am not asking you that. Did anybody walk by toward the period you had them under surveillance?

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Salvamini-cross-redirect

34

A Not that I can recall.

MR. STEINBACH: All right.

THE COURT: Anything further?

MR. BENTLEY: Yes.

REDIRECT EXAMINATION

BY MR. BENTLEY:

Q Agent Salvamini, I would like to show you what has been previously marked as Government's Exhibit 3516. If the Court so desires it, we could remark it as Government's Exhibit 1 in this hearing.

(Government's Exhibit 1 was marked for identification.)

Q I believe on direct you testified that you had no other recollection of what had occurred immediately prior to the arrest beyond Agent O'Connor handing the money under the table to Mr. Glenn.

I would like you to examine paragraph 5 of this document and see if that refreshes your recollection of what occurred.

MR. STEINBACH: Your Honor, I would object to any refreshed recollection at this point. I don't believe it is within the scope of redirect.

THE COURT: You are asking him to look at that to refresh his recollection to see what occurred when?

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Salvamini-redirect

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2 MR. BENTLEY: Immediately prior to the arrest.
3 This matter was gone into on cross.

4 THE COURT: It was covered on cross examin-
5 ation.

6 A Yes.

7 Q What is your recollection as now refreshed?

8 A The defendant Glenn handed under the table
9 to Special Agent O'Connor a white envelope which contained
10 a quantity of LSD, I think 5,000 tablets of LSD.

11 Q How was the lighting in the restaurant at that
12 hour?

13 A It was excellent.

14 MR. BENTLEY: No further questions.

15 THE COURT: What time was this?

16 THE WITNESS: About 11:20, 11:30 or so in the
17 evening, your Honor.

18 THE COURT: How many people were in the restaur-
19 ant?

20 THE WITNESS: I would say there were maybe a
21 dozen people in the restaurant. It was a reasonably large
22 establishment, but it wasn't crowded by any means. As
23 a matter of fact, I believe they had some of the counter areas
24 close off.

25 THE COURT: Anything further?

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Salvamini-redirect-recross

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MR. STEINBACH: A couple of questions.

RECROSS EXAMINATION

BY MR. STEINBACH:

Q Was it as light as the courtroom is right now?

A It believe it was brighter.

MR. STEINBACH: No further questions.

THE COURT: Anything further?

MR. BENTLEY: No, your Honor.

THE COURT: All right, thank you.

You may come down.

(Witness excused.)

THE COURT: The government have another witness?

MR. BENTLEY: No, your Honor. The government rests at this time.

MR. STEINBACH: The defense rests.

At this time I would renew the motion on the following grounds, your Honor:

It appears that Mr. Rivera was sitting at a table in this restaurant next to Mr. O'Connor while Mr. Glenn, the defendant, passed LSD under the table and received money in return or received money first and then passed the LSD. During this time Mr. Rivera was seated next to

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2 Mr. O'Connor.

3 There has been this testimony that Mr. O'Connor,
4 according to his own testimony, counted the money down low
5 under the table while Mr. Rivera was sitting next to him.
6 According to Mr. O'Connor, Mr. Rivera said nothing during
7 that period, merely sat there. He then passed the money
8 over to Mr. Glenn.

9 Mr. Salvamini testified he saw the money being
10 counted. I submit that is a physical impossibility given
11 how far he was from those people, where they were sitting
12 in relation to each other, where Mr. O'Connor's hand would
13 have to be, under the table, between the two people.
14 I submit his testimony cannot be believed on his seeing this
15 counting of the money.

16 In any event, neither of them testified that
17 Mr. Rivera either took the money or actually counted it,
18 that is, Mr. O'Connor was free to count the money in
19 Mr. Rivera's presence if he wanted to, but there is no
20 indication Mr. Rivera responded in any way that would
21 indicate a participation in any crime at that time.

22 There are of course cases in the Second Circuit,
23 I believe United States v. Cirillo and United States v.
24 Tramunti, which say that mere presence at the place
25 of the commission of a crime does not indicate either

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2 participation in the crime itself or in a conspiracy to
3 commit that crime. I will say those cases dealt with
4 the sufficiency of the evidence after trial and not probable
5 cause, but I think by analogy they would apply here.
6 That is, if somebody can't be convicted, if a case can't be
7 sent to a jury on the basis of presence at the scene of a crime,
8 I submit somebody can't be arrested for it either. I think
9 Mr. O'Connor explained the reason that Mr. Rivera was
10 arrested, that the signal was that when he ran his fingers
11 through his hair everybody was going to be arrested who
12 wasn't a DEA agent. That was his testimony.

13 I think that was the reason that Mr. Rivera was
14 arrested at that time.

15 I submit to your Honor that that was not probable
16 cause to arrest, that his detention was therefore in
17 violation of the Fourth Amendment, and that the statement
18 given during that retention, secured as a result of the
19 violation of the Fourth Amendment, should be suppressed.

20 MR.BENTLEY: Your Honor, I think the standard
21 for probable cause is quite different from the standard
22 beyond a reasonable doubt, and I just express that at
23 the outset without conceding the factual conclusions
24 reached by counsel. In fact, there is much more here than
25 mere presence at a table. This is a situation where the agent

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2 had ample reason for believing that Mr. Rivera was con-
3 spiring and also had constructive possession of the
4 LSD in question.

5 Mr. Rivera was seated next to Agent O'Connor
6 at the table. Mr. Glenn, who actually had physical
7 custody of the LSD, was seated next to Mr. Meyerson on the
8 other side of the table. Mr. Glenn wanted to return to
9 his apartment to conduct this transaction because the
10 restaurant was too public. Mr. Rivera was present at the
11 table, obviously heard that comment.

12 The agent suggests in lieu of going to the apart-
13 ment that the money would be counted at the table, out of
14 sight of most of the people in the restaurant, and then given
15 to Glenn under the table.

16 In order for the transaction to occur the
17 participation of Rivera was vital. Rivera, who was seated
18 next to the agent, could examine the money, verify that
19 it was all there, and then indicate to Glenn that the
20 situation was proper for the transfer of LSD in exchange
21 for the money that the agent had. The agent was in no
22 position to put the money on the table and count it in front
23 of Mr. Glenn, who was across the table from him. That
24 would have been too public. That would have had all
25 of the problems of detection which Mr. Glenn was concerned

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2 about. Soe he had the person who accompanied Mr. Glenn to
3 the restaurant, Rivera, look at this money as it was
4 counted.

5 THE COURT: Did Mr. O'Connor testify that Mr.
6 Rivera looked at the money as it was being counted?

7 MR. BENTLEY: I believe he did. Agent Salvamini
8 said he did and Agent O'Connor indicated that Rivera had
9 agreed by nodding his head to following this procedure for
10 conducting this transaction, and the fact that he didn't say
11 anything is significant not to show that he was not in-
12 volved, but that he was satisfied that the \$1800 that had
13 been offered for the LSD was in fact in the possession of the
14 agent, and I think the agent would have been remiss had
15 they simply arrested Mr. Glenn and said "Well, we don't
16 think Mr. Rivera was involved." The agents had every
17 reason to believe that Mr. Rivera was intimately involved
18 in this transaction.

19 THE COURT: And that's because he looked, as you
20 say, as O'Connor counted the money under the table.

21 MR. BENTLEY: I don't believe he testified
22 under the table. Below the level of the table, your
23 Honor. He didn't testify that it was physically
24 under the table top. It was between the two men under the
25 level of the table top, where it could not be seen let us say

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2 from across the other side of the table by Mr. Glenn. That
3 is why Mr. Rivera had to be involved.

4 THE COURT: Let me ask you this: Did Mr. O'Connor
5 testify that Mr. Rivera said anything during the course of
6 these negotiations?

7 MR. BENTLEY: Orally he did not say that
8 Mr. Rivera said anything. He did say that Mr. Rivera had
9 nodded his head in assent on a couple of occasions.

10 THE COURT: To whom?

11 MR. BENTLEY: To Mr. O'Connor. He testified
12 that he had suggested that he, O'Connor, would count out
13 the money, which Rivera would observe, and after counting the
14 money, if the amount was correct, he, O'Connor, would pass
15 the money under the table to Glenn and Glenn would pass him
16 back the LSD.

17 Rivera assented to this by nodding.

18 THE COURT: The defendant Rivera was arrested
19 by Salvamini, is that right?

20 MR. BENTLEY: Yes, your Honor.

21 THE COURT: And Salvamini didn't hear any of this
22 conversation, did he?

23 MR. BENTLEY: He observed Rivera watching the
24 money being counted.

25 THE COURT: He didn't hear the conversation in

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2 which you claim Rivera agreed to participate by watching
3 the count and then adding to Glenn, is that so?

4 MR. BENTLEY: He did not hear that conversation.

5 THE COURT: All right.

6 MR. BENTLEY: He was also acting pursuant to the
7 signal given by O'Connor.

8 THE COURT: What signal?

9 MR. BENTLEY: Scratching his head.

10 THE COURT: O'Connor testified that their agree-
11 ment was that everybody at the table would be arrested when
12 he scratched his head, isn't that so?

13 MR. BENTLEY: I don't think that's relevant
14 if there was probable cause for this defendant's arrest.

15 THE COURT: That was what I was getting at.
16 What probable cause did Salvamini have? He didn't hear
17 the conversation, isn't that so?

18 MR. BENTLEY: That is correct.

19 THE COURT: He testified that the distance
20 he estimated that he was from the defendant was from
21 the witness stand to the door of the courtroom, which I
22 estimate about 25 feet. Isn't that so?

23 MR. BENTLEY: That was my estimate, also, your
24 Honor. He was seated on a stool at a lunch counter.
25 I think your Honor can take judicial notice that he would be

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2 slightly more elevated than the level of the people sit-
3 ting at the table. Mr. Rivera had turned, I believe, or
4 was at an angle, so that he could observe the money being
5 counted. Agent O'Connor was more or less with his back to
6 the wall. Agent Salvamini was looking directly at that
7 scene at the table from his position.

8 THE COURT: And he saw Rivera watch O'Connor
9 count the money?

10 MR. BENTLEY: That is correct.

11 THE COURT: What else did he testify that he had
12 seen?

13 MR. BENTLEY: He saw the money after it had been
14 counted being passed under the table to Glenn and he also
15 saw Glenn pass an envelope under the table to O'Connor.

16 THE COURT: What did he see Rivera do?

17 MR. BENTLEY: He saw Rivera nod his head on oc-
18 casion.

19 THE COURT: But he didn't hear the conversation,
20 so how does he know what he is nodding his head to? If he
21 didn't hear the conversation how did he have probable
22 cause to arrest Rivera for nodding his head? It is not
23 probable cause to arrest anybody if they nodded their head,
24 is it?

25 MR. BENTLEY: If Agent O'Connor had made the ar-

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2 rest I don't think there would be any question that Agent
3 O'Connor had probable cause. If Agent O'Connor had pointed
4 to Mr. Rivera and said "Agent Salvamini, arrest this man,"
5 I don't think that an arrest would be any more subject to
6 question than the arrest by Agent O'Connor. I think
7 there was probable cause for an arrest.

8 THE COURT: You say by O'Connor.

9 MR. BENTLEY: Yes.

10 THE COURT: But there was not by Salvamini.

11 MR. BENTLEY: I believe there was for Salvamini
12 also your Honor. He observed the participation of Rivera
13 in the transaction.

14 THE COURT: All right. He saw Rivera watch
15 O'Connor count the money, right?

16 MR. BENTLEY: That is correct.

17 THE COURT: And he saw Rivera nod his head, is
18 that it?

19 MR. BENTLEY: Yes.

20 THE COURT: Did he see anything else?

21 MR. BENTLEY: He saw the money pass under the
22 table.

23 THE COURT: He saw what?

24 MR. BENTLEY: He saw the money --

25 THE COURT We are talking about Rivera.

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2 What did Rivera do?

3 MR. BENTLEY: I think your Honor has summarized
4 it accurately.

5 THE COURT: Two things, then; he saw him nod his
6 head, he saw him watch O'Connor counting money. Is that
7 probable cause for arrest by Salvamini?

8 MR. BENTLEY: I believe it is, your Honor.
9 Your Honor, Agent O'Connor gave the pre-agreed upon arrest
10 signal. Whether Agent O'Connor had previously stated
11 "Arrest anyone at the table" or "When I give this signal come
12 to the table, I will tell you to arrest," seems to me to be
13 irrelevant, unless there is someone at the table who should
14 not have been arrested.

15 THE COURT: Wait a moment. I don't know that
16 I am following that. Start again.

17 MR. BENTLEY: Whatever Agent O'Connor had
18 previously said with respect to the arrest signal as far as
19 who should be arrested doesn't, to my view, come into play
20 unless there was an individual at that table as to whom
21 Agent O'Connor did not have probable cause.

22 THE COURT: In other words, you are saying
23 the arrest here was made by O'Connor, not Salvamini?

24 MR. BENTLEY: I am saying that it was made at
25 O'Connor's direction, that where Agent Salvamini had from

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2 his position enough information to warrant an arrest, let
3 us say if he was observing four individuals whom he didn't
4 know, none of whom was a government agent, none of whom was
5 an informant, I think we would have a very different
6 situation than we do here, where one of the participants
7 was a drug enforcement agent who gave a signal, and
8 I think the critical question is whether there was probable
9 cause for Agent O'Connor to give that signal when he did,
10 because Agent Salvamini didn't simply decide on his
11 own "I am going to make the arrest at this time," he waited
12 until that signal was given, and he was acting pursuant to the
13 direction of Agent O'Connor.

14 THE COURT: So the question is whether Agent
15 O'Connor had probable cause to arrest.

16 MR. BENTLEY: Yes, your Honor.

17 THE COURT: All right. Let's see what his
18 probable cause was. He testified that Glenn and Rivera
19 came into the restaurant and took seats, is that it,
20 Glenn sitting next to Meyerson and Rivera sitting next to
21 O'Connor?

22 MR. BENTLEY: That is correct.

23 THE COURT: Then Glenn asked Meyerson where was
24 the money for the earlier transaction, is that it?

25 MR. BENTLEY: Yes, your Honor.

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2 THE COURT: What did Meyerson say?

3 MR. BENTLEY: I think Agent O'Connor answered
4 that question by saying that he, O'Connor, still had the
5 money from the earlier transaction and that he would provide
6 that money to Glenn in exchange for which Glenn would furnish
7 him the second installment of this 10,000 dose transaction,
8 after which O'Connor would pay the second half of the pur-
9 chase price. Then Glenn indicated that he did not want
10 to do this in the restaurant because it was too public.
11 O'Connor said "We are going to do it here or we won't do
12 it at all." Then this procedure was suggested for counting
13 the money and conducting the transaction under the table.

14 This conversation occurred in the presence of
15 Mr. Rivera. He was seated right at the table. He wasn't
16 under the influence of drugs or alcohol. Mr. O'Connor said
17 his appearance was normal. He watched the money being
18 counted. Prior to that he agreed that he would play that
19 role in the transaction.

20 The government submits that he had constructive
21 possession of the LSD, because Mr. Glenn would not have
22 passed that LSD under the table had not Mr. Rivera -- let
23 us say this: Had Mr. Rivera said "The money is not here, it
24 is not enough," that LSD would have stayed right in
25 Mr. Glenn's possession.

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2 THE COURT: Tell me what the conversation was
3 according to the witness O'Connor between himself and
4 Glenn. What did he testify as to how they would proceed?

5 MR. BENTLEY: He stated that he would count
6 the money, Rivera would watch him count the money, then he
7 would pass the money to Glenn under the table and
8 Glen would pass him the LSD. At that point everyone
9 agreed to that. Mr. Rivera indicated his assent by nodding.

10 THE COURT: But he didn't say anything, is
11 that it?

12 MR. BENTLEY: He didn't say "I agree". He
13 nodded.

14 THE COURT: Then what else did Mr. Rivera do,
15 according to Mr. O'Connor?

16 MR. BENTLEY: Then he watched the money being
17 counted and nodded after it was counted. At that point
18 the transfer of the money for the LSD occurred between
19 Glenn and Agent O'Connor.

20 THE COURT: All right.

21 Mr. Reporter, would you read the direct testimony
22 of Mr. O'Connor.

23 (Record read.)

24 THE COURT: I don't recall Mr. O'Connor saying
25 anything about Mr. Rivera nodding to Mr. Glenn that the

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2 money had been counted. Did you hear that?

3 MR. BENTLEY: I did not, your Honor. I think
4 given the prior assent to the manner in which the trans-
5 action was conducted I think the agent had probable
6 cause to arrest the defendant, because he said nothing,
7 because he acquiesced in the passing of the money, which he
8 would not have done had the money been insufficient.

9 THE COURT: In any event, the first time that
10 O'Connor knew about what Rivera was when he came into the
11 restaurant with Glenn, isn't that so?

12 MR. BENTLEY: That is correct.

13 THE COURT: According to O'Connor, he arrested
14 Meyerson earlier along with Mark Fisher, is that right?

15 MR. BENTLEY: Yes, your Honor.

16 THE COURT: And Meyerson agreed to turn over
17 his source, is that right?

18 MR. BENTLEY: That is right.

19 THE COURT: And his source was Glenn, isn't
20 that so?

21 MR. BENTLEY: That's right.

22 THE COURT: And he made a telephone call to
23 Glenn, isn't that so?

24 MR. BENTLEY: Yes, your Honor.

25 THE COURT: He didn't say anything about

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2 Rivera, did he?

3 MR. BENTLEY: Maybe he didn't know Rivera was
4 Glenn's partner, your Honor.

5 THE COURT: That is what we are getting at, isn't
6 that so? And so Meyerson called Glenn to come for the
7 transaction, to complete the transaction, that is, bring the
8 LSD, get the money, isn't that so?

9 MR. BENTLEY: Yes, your Honor.

10 THE COURT: And again came into the restaurant
11 accompanied by Rivera, isn't that so?

12 MR. BENTLEY: That is correct.

13 THE COURT: What we have then is O'Connor's
14 testimony that Rivera assented to arrangements which he,
15 O'Connor, had made with Glenn, is that it, about counting
16 money?

17 MR. BENTLEY: Yes, your Honor. We also have the
18 prior conversation concerning Glenn's reluctance to conducting
19 the transaction in the restaurant because it was too public,
20 the fact that Rivera was present at the table and
21 Rivera could be inferred to know what was going on was an
22 illegal transaction.

23 THE COURT: And the LSD was pssed under the
24 table by Glenn, is that it?

25 MR. BENTLEY: Yes, your Honor.

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THE COURT: All right. Did you want to say anything, Mr. Steinbach?

MR. STEINBACH: I just wanted to point out a couple of things, your Honor. First of all, the fact that Mr. Bentley just brought out, that Mr. Glenn said he didn't want to do this transaction in the restaurant at all, but in his apartment, only indicates that Mr. Rivera was not there to help him in the transaction, because they hadn't come to the restaurant by that statement to do anything.

The second thing is that Mr. O'Connor made a point of correcting me about the procedures for this transaction, that is, the money went first under the table to Mr. Glenn and then the LSD was going to come back under the table. If the money was going to be passed first to Mr. Glenn before any LSD was passed then Mr. Rivera's participation was completely unnecessary, because Glenn would get the money before he would part with any LSD and he could count it himself, and for all we know, he did.

The third point is that this plan to which Mr. O'Connor says Mr. Rivera nodded after he discussed it was all Mr. O'Connor's doing. That is, he says "I am now going to count the money and I will have Mr. Rivera look." It wasn't as if Mr. Rivera or Mr. Glenn said "Show the money to Mr. Rivera, he will count it." It was something

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2 that Mr. O'Connor did perhaps to draw Mr. Rivera into this,
3 but it was certainly something that did not originate with
4 either Mr. Glenn or Mr. Rivera.

5 MR. BENTLEY: If I may respond to that, your
6 Honor, first of all, the reason the money was counted on
7 Mr. O'Connor's side of the table was because Mr. O'Connor
8 did not want to let that money go without assurance that
9 he would get the LSD

10 THE COURT: But he did pass it first, isn't
11 that so?

12 MR. BENTLEY: After it had been counted.

13 THE COURT: He passed the money under the table
14 to Glenn, isn't that so?

15 MR. BENTLEY: Yes, your Honor.

16 THE COURT: Why couldn't have Glenn counted the
17 money and assured himself that he had it, and having done
18 that, passed it back? What guarantee did O'Connor have
19 that after he passed the money, even when it was counted,
20 that Glenn would then turn over the merchandise? None
21 whatsoever, did he?

22 MR. BENTLEY: This was payment for merchan-
23 dise that O'Connor already had, the first 5,000 dosage
24 units.

25 As to counsel's argument that Mr. O'Connor set

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2 this up --

3 THE COURT: What is the second thing then
4 done?

5 MR. BENTLEY: It was the second 5,000
6 dosage units that was turned over to O'Connor after the
7 money was passed and O'Connor still had to pay for that
8 transaction at the time the arrest was made.

9 THE COURT: O'Connor had to pay for the first
10 transaction and he said "I will not pay for the first
11 transaction until I get the second amount," isn't that so?

12 MR. BENTLEY: I believe he testified that he
13 was paying for the first transaction and he would not pay for
14 the second transaction until he got the LSD that was in-
15 volved in the second transacton, which was what O'Connor
16 passed him after the money -- excuse me -- what Glenn
17 passed him after the money went under the table.

18 THE COURT: You say that O'Connor found the necess-
19 ity before passing that money to have Rivera observe
20 that the money was all there, is that so?

21 MR. BENTLEY: I am saying that is the way the
22 transaction occurred.

23 THE COURT: I am getting at where there was any
24 reason for that. There doesn't appear to be any reason
25 for Rivera to observe that the money was all there,

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2 since his statement to Glenn was "I am not going to
3 pay you until I get the second amount," but he did pay
4 him.

5 MR. BENTLEY: That was payment for the prior
6 lot of LSD, the lot that was involved at the El Tor
7 Restaurant earlier in the evening. One reason why O'Connor
8 or Glenn may have assented to this procedure is that Glenn
9 was sitting on the aisle, facing the door, facing the
10 area where people would come in and go out of the restaurant.
11 It may be that Glenn went along because he didn't want to
12 be -- he wouldn't be in a position to count the money as
13 easily as Rivera and O'Connor, who were seated with their
14 backs toward the door.

15 THE COURT: Let us start again. O'Connor said
16 to Glenn "I am not going to give you the money for the
17 first transaction until I get the LSD for the second
18 purchase," is that it?

19 MR. BENTLEY: No. I believe he testified that
20 he said he would pay for the first transaction but not pay
21 for the second transaction until he had received the drugs
22 involved in that transaction.

23 MR. STEINBACH: Your Honor, I don't believe
24 that was the testimony. I think it was just the opposite
25 by both Mr. O'Connor and Mr. Salvamini. My notes indicate

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2 that he passed the money first to Glenn, Glenn then passed
3 the LSD.

4 MR. BENTLEY: That is correct, but the LSD that
5 was passed was LSD that had not been paid for. The first
6 passing of money was in payment for the prior 5000 dots
7 that were received by Agent O'Connor at the El Tor Restaur-
8 ant.

9 As the Court recalls, the testimony was that
10 when Mr. Glenn came in he said to Mr. Meyerson, the middle
11 man here, "Where is the money, where is the money for the
12 first transaction?" He expected Mr. Meyerson to have that
13 money.

14 Agent O'Connor said "I still have it. I want
15 to complete the whole thing now, make sure I am going to get
16 my 10,000 dosage units."

17 THE COURT: All right. So why couldn't he have
18 passed the money to Glenn and said "Here is the money for
19 the first transaction and give me the second installment
20 of LSD." ?

21 MR. BENTLEY: In effect, that is what he did,
22 except Glenn was not in a position, the way the transaction
23 was arranged, Glenn was not going to count that money,
24 he was going to take it under the table and keep it without
25 looking at it, because it had been counted by Mr. Rivera.

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2 THE COURT: It just doesn't seem to me to
3 make any sense to have Mr. Rivera watch the counting of
4 the money which was done in a restaurant. What was the
5 point of that? All he had to do was hand it to Glenn
6 under the table and have Mr. Glenn count it to satisfy
7 himself that he had \$1800 and then pass the second install-
8 ment. There wasn't any reason in the world to involve
9 the defendant Rivera, as the defendant Rivera claims. His
10 claim is he was just brought into this by the agent, and we
11 are examining his claim to see whether there is anything to
12 that, aren't we?

13 MR. BENTLEY: That may be a matter for defense
14 at trial, your Honor, but in a suppression hearing the
15 question is did the agent have reason to believe that
16 Rivera had an agreement with Glenn with regard to this
17 LSD or did he have sufficient control over the LSD
18 to be charged, and I think a reasonable man would have
19 concluded --

20 THE COURT: He was the one who brought
21 Rivera into it, as Rivera's lawyer says. He, O'Connor,
22 used Rivera as his agent for purposes of counting the
23 money. Isn't that what happened?

24 MR. BENTLEY: I don't think O'Connor --

25 THE COURT: It wasn't Glenn's idea that Rivera

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2 should watch the counting of the money on Glenn's behalf.
3 It was an idea which originated with O'Connor, isn't that
4 so?

5 MR. BENTLEY: And to which --

6 THE COURT: O'Connor said "We can have Rivera
7 watch the money being counted."

8 MR. BENTLEY: That is correct.

9 THE COURT: So that O'Connor had no basis for
10 concluding that Rivera had constructive possession of the
11 LSD, did he?

12 MR. BENTLEY: I believe he did because
13 Mr. Glenn recognized Rivera's role in this thing.

14 THE COURT: How, by suggesting that he watch the
15 counting of the money?

16 MR. BENTLEY: By not transferring that money --
17 by transferring the LSD after the money had been counted.

18 THE COURT: No, I am talking about Rivera. Did
19 he recognize Rivera's role in this thing?

20 MR. BENTLEY: Mr. Glenn passed the LSD after
21 accepting money that he had not counted in reliance upon
22 the fact that when Mr. Rivera watched this money being
23 counted he had made no statement to the effect that
24 "There is less money here than has been agreed upon."

25 THE COURT: We went over that earlier.

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2 Rivera said nothing after watching the money being counted.

3 MR. BENTLEY: That is right. If there had been
4 less money there than Agent O'Connor suggested this deal would
5 not have occurred, the LSD would not have passed.

6 THE COURT: That's a supposition or speculation
7 on our part. There is no evidence to support that.

8 MR. BENTLEY: I believe that on the facts
9 it was reasonable for the agent to conclude that Mr. Rivera
10 was involved in this deal and that the deal would not
11 occur without Mr. Rivera's implicit endorsement of the fact
12 that the money was there.

13 I think there is a different standard here,
14 your Honor, than a question of whether Mr. Rivera may have
15 been entrapped, which is a jury issue at trial. The
16 government is not at a burden here to prove that Mr. Rivera
17 was guilty at the time he was arrested.

18 THE COURT: The question is whether Mr. O'Connor
19 had probable cause to arrest the defendant Rivera, and as
20 I see it, he had no basis for concluding that Mr. Rivera
21 was a partner or had constructive possession of the LSD
22 when he sat down at the table with Glenn. He then sug-
23 gested, according to his testimony, that Rivera watch
24 the counting of some money. He doesn't tell us that
25 Rivera said anything, he simply nodded, and then, when the

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2 money was counted, he doesn't tell us that Rivera nodded to
3 Glenn. So that I don't think he had any probable cause to
4 believe that Rivera had constructive possession of that
5 merchandise.

6 MR. BENTLEY: Your Honor, I would request
7 permission to recall Agent O'Connor on that particular
8 point, your Honor, since I believe it is a critical point.
9 Frankly, the government anticipated that that aspect of the
10 case would be brought out, and if your Honor would care to,
11 I would respectfully ask permission to recall him for one
12 or two questions.

13 THE COURT: One or two what questions?

14 MR. BENTLEY: On the issue of what Rivera did
15 after the money had been counted.

16 THE COURT: He has already testified. He didn't
17 testify that Rivera nodded or said anything after the money
18 was counted, and it is the defendant's claim that this was
19 something made up by O'Connor to involve Rivera, and it seems
20 to me that is what happened here. O'Connor didn't have any
21 probable cause to believe that Rivera had constructive
22 possession of that merchandise when he came into the restaur-
23 ant. Meyerson certainly hadn't mentioned it.
24 Meyerson called Glenn. Glenn had the package in his
25 possession. From all that appears, Rivera just happened to

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1 be along. Glenn did not intend to have any transaction
2 in the restaurant, as O'Connor himself testified.
3
4 Glenn said he wouldn't have any transaction in the
5 restaurant. He, Glenn, was conducting this. And it was
6 O'Connor who brought Rivera into it, and there is no basis
7 for, even on his testimony, concluding that Rivera even
8 agreed, because he doesn't tell us that Rivera said anything
9 or did anything. He said he watched him count some money
10 as he held it to his side and then he passed the money
11 under the table to Glenn first, which he certainly could have
12 done in the first instance and said "Here, count it, and then
13 give the second package," because if the package had come
14 first then his story would have a little more validity, but he
15 passed the money first, which renders his statement that
16 Rivera had to watch the counting not believable.

17 The motion is granted.

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WITNESS INDEX

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